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THE
UPPER CANADA JURIST;

CONTAINING

ORIGINAL AND SELECTED ARTICLES ON
LEGAL SUBJECTS;

SOME IMPORTANT DECISIONS
IN BANKRUPTCY AND CHANCERY IN UPPER CANADA,
AND IN THE
ENGLISH COMMON LAW COURTS.

WITH AN

ALPHABETICAL LIST OF CASES, AND
INDEX OF PRINCIPAL MATTERS.

VOL. I.

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THE UPPER CANADA JURIST.

IMPRISONMENT FOR DEBT.

Our attention has been called to "Imprisonment for Debt," by the act passed during the last session of the Provincial Legislature, "to abolish imprisonment in execution for debt, and for other purposes therein mentioned;" and although we are aware that the subject is hackneyed, and that we can bring few, if any, fresh arguments to its consideration, yet the many peculiarities of the new statute render remark upon it necessary, but we shall endeavour to confine our observations to imprisonment in execution, as it is against arrest on final process that the new law is chiefly directed. During the last twenty years, there has been much legislation on the subject of arrest for debt in Europe; and in England in particular, a great change has been wrought, since the issuing of the commission to inquire into the practice and proceedings of the Superior Courts of Common Law, and the report of the commissioners on the efficacy and expediency of "Imprisonment for Debt," but that change has not gone the length, nor indeed was such an extreme ever contemplated by the commissioners, of a total abolition of arrest and imprisonment in execution, but the largest measure of indulgence that it was at any time considered that the debtor should be allowed, was, that he should not be liable to arrest in execution, unless his creditor could swear to his fraudulent intention to abscond, or assign his property, to evade the payment of his debt. In almost all the states in Europe, and in all the United States of America, except New York and Maine, the creditor after judgment is allowed his choice of process against the person or property of his debtor, and even in those states where no such choice is given, and the process of execution is con-

fined to the property alone, there are means afforded to the creditor of discovering it, which in some degree compensate him for the loss of his remedy against the debtor's person. By this statute, there are no means afforded to the creditor, who has proceeded to judgment without arresting his debtor, of discovering his debtor's property, and if after he has recovered judgment, his debtor should assign a large part, or the whole of it, before he can issue execution against it, he cannot proceed against his person, but must be content to run the risk of an expensive and hazardous contest, to test the validity of the assignment, while he may not even arrest on an action on the judgment, without swearing to his belief of the debtors immediate departure from the Province of Canada with intent and design to defraud him of his debt. As the law stood in Upper Canada before this act was passed, there were two modes by which the person of the debtor might be attached; on mesne process, by the creditor's affidavit of apprehension that he would leave Upper Canada without satisfying his debt, sworn to—or on final process, on the same description of affidavit, or on affidavit that he had parted with his property or made some secret or fraudulent assignment of it, to prevent its being taken in execution; and it frequently happened under the former law, that creditors, who believed that there had been some secret or fraudulent assignment of the debtor's property, but could not swear to an apprehension that he would leave the province, would proceed in judgment on serviceable process, and take the debtor in execution afterwards, on affidavit of that fraud, which they could conscientiously swear to, while they had no such apprehension of the debtor's departure from the province, as could warrant his arrest in the commencement of the action. By the new law, a creditor under such circumstances is totally debarred of remedy; execution against property is unavailable, execution against the person disallowed, and the debt must either be left to the contingencies of time for its recovery, and perhaps be lost altogether, or the creditor must take an affidavit against which his conscience revolts, and be guilty of a moral, if not a legal perjury. It is true that in a community so poor, as that generally to be found in a new country, there are not

those facilities for incurring large debts and running into heavy expenses, that exist in long established and wealthy states, but the injury inflicted on a creditor by a profligate or dishonest debtor in the former may be equally as severe, and perhaps more severe than in the latter, while the very absence of wealth, may render it unavoidable that a credit should be given which the debtor may afterwards determine shall find no limit in point of time, if the creditor be unprovided with a means of compelling payment by process against his person.

The spirit of the present age seems as much in favor of indulgence to the debtor, as that of the past was of protection to the creditor, and in the popular cry for the abolition of arrest of the person, the debtor is always treated as an undeservedly injured party, and the creditor as one, who in seeking payment of his debt by process of imprisonment, is making use of a harsh and tyrannical law for bad and oppressive purposes. Johnson said in his time, "we have now imprisoned one generation of debtors after another, but do not find their numbers lessen," and we might say in ours, that we have given a generation release, but have not experienced a different result. In England, the insolvent courts afford a perpetual gaol delivery for debtors, and in this country, the acts relating to insolvency, have given almost as many facilities for relief, as could be obtained under the more favoring laws at home; but we have not heard that in either the parent state or the colony, arrest has been less frequent because indulgence has been greater—on the contrary, there have been as many arrests, although not such a length of imprisonment.

The popular feeling has been in favor of abolishing arrest on mesne process, and legislation in England has been directed to the end, but here we allow preliminary arrest to remain, and take away arrest in execution, and we give no power to the creditor in lieu of that of which we have deprived him. We have already said that it is not our intention to enter into any examination of the arguments for or against arrest on mesne process, but we must deprecate this wholesale sweeping away of imprisonment in execution, without giving any equivalent for it, and legislating upon the presumption of the innocence of debtors. We cannot agree with Johnson, and

say "let those whose writings from the opinions and the practice of their contemporaries, endeavor to transfer the reproach of such imprisonment from the debtor to the creditor, till he shall be hunted through the world as an enemy to man, and find riches no shelter from contempt;" but we are rather ready to exclaim with Paley, "there are frauds relating to insolvency, against which it is as necessary to provide punishment as for any public purposes whatever."

We think that, independently of the defects in the statute itself, which we shall presently proceed to point out in detail, there are several strong objections to the abolition of arrest in execution, which seem to us of sufficient importance to call for a repeal or modification of the act, and which were not sufficiently considered, nor indeed at all thought of, as far as we can judge, from the published debates, while it was passing through either branch of the legislature. In all countries in which personal arrest has been allowed, it has been as a security for the creditor, and has chiefly arisen from the system of credit, that has of necessity grown out of commercial transactions, but which, it has been argued, has proceeded to so ruinous an extent, nourished and fostered by the very power which this law as abolished in part, that it has become necessary to place the strongest check upon it, by the removal of one stringent means of compelling payment from the creditor's control. There is, therefore, we may assume, a benefit intended to the creditor by repressing, extravagant credit, as well as an indulgence granted to the debtor, by restraining oppressive arrest; but we conceive that the gain to the creditor will be but little, while the debtor will undoubtedly reap much; and the fallacy, on which the argument for the good of the creditor is founded, will only be exposed, after the mischief is wrought to him, and steps have been taken which it may be difficult, and perhaps impossible ever to retrace. We cannot contend that credit is never given which is pernicious; but we must contend that there ought to be in every community a sound credit, which should be well protected, but which must be equally destroyed with the pernicious credit, by a law which removes one of its strongest securities. The credit which we

would desire to see upheld, is that which is usually given in the commercial world, when no extraordinary risk is incurred—the credit which a cautious dealer would always desire to afford; and any thing which tends to destroy it, must be followed by disastrous results, as one great facility of commercial intercourse must be removed, or prices must be raised in proportion to the risk that is to be run, and credit will then be reduced from the sound and healthy state in which we should wish it to be found, to the corrupt and unwholesome state in which it exists among extortioners and usurers. It must, no doubt have been the intention under this act to confer a benefit upon the debtor, without inflicting an injury upon the creditor, but its practical working will never permit of such an intention being fulfilled. Was it intended that a stop should be put to the contracting of improvident debts? Our acquaintance with human nature will tell us that such will not be the consequence; and the history of the insolvent courts in England furnishes in every page strong and convincing proof to the contrary. Was it intended that credit should be abolished? That end will not be attained—credit will continue, but it will be a gambling credit, bought at a price commensurate with the risk of loss to the creditor, and introducing an unwholesome system into commercial affairs. Was it intended to encourage the debtor in his efforts for payment? It will have no such effect. He will dissipate his property, or make some secret assignment of it, which will render it unavailable as a means of satisfaction on execution. It is true, that in this country there is not a very large portion of property invested in stocks, and that even such as is so invested is in certain cases liable to execution, but there are many ways in which a debtor might secure his property against his creditor, and live on its profits or interest, without it being possible that satisfaction should be obtained from it; and if the creditor could not conscientiously take the affidavit to arrest on mesne process prescribed by the act, he would be debarred of remedy, and a fraudulent or dishonest man might baffle those who had just claims against him, and laugh at their demands, while he secured to himself the enjoyment of property which

ought to be expended in the payment of his debts. But if such be the situation of the creditor with the debtor possessed of property, held in secret trust for him, or in funds that an execution cannot reach, how much worse is his position when his debtor is without property at all. The incentive to exertion on the part of the debtor is taken away; he will make no effort to pay a debt from which he cannot possibly suffer any inconvenience; he will use no means to relieve himself from a liability, by which he cannot be subjected to personal restraint; and the creditor may seek, and seek in vain for the payment of his money, even at a time that he knows that his debtor might by a little exertion discharge his debt—an exertion that he will not make, because there is no power to compel him, nor any fear of imprisonment “from the fair face of day” to furnish the motive which honesty and justice cannot supply. But again, suppose the debtor to have been possessed of property, of which he has made some secret assignment, or executed some doubtful trust; he has no burthen of proof thrown upon him, no risk to run, nor expense to incur; but if the creditor, having obtained, a clue to the assignment or trust, deems that it is fraudulent, or without consideration, to evade the payment of debts, and determines to enforce his execution against it, the hazard must be his, the trouble and expense must fall upon him; while the debtor, even if eventually unsuccessful in his attempt to defraud, has played his game, and has had the chance of retaining the benefit to be derived from property, which, had it remained in his own name or possession, would have gone in the first instance to satisfy his creditor, and which under the old law, it would have been his interest to surrender, to avoid the imprisonment which might otherwise have followed.

We might extend our remarks to a much greater length, but we think that we have stated enough to cause further inquiry on the subject, and we shall now proceed to examine the state of the law of discharge for insolvency, at the time this act was passed, to ascertain the necessity for this additional legislation; as it has been used as a strong argument, that the misery to the debtor by imprisonment is out of all proportion to the advantage gained by the creditor. By

stat 45 Geo. III., ch. 7, insolvent debtors in execution in this province first became entitled to a weekly provision of five shillings, to be paid by them by the plaintiff, and this indulgence was by 4 Will. IV., ch. 3, extended to insolvent debtor in custody on mesne process, and in both cases, unless the allowance were paid by the plaintiff on the third Monday after the service of the order for its payment, the debtor was entitled to his discharge from the imprisonment, provided that he had given satisfactory answers to any interrogatories which his creditor might have put to him touching his property and effects, and without which answers he was not even entitled to the benefit of the allowance itself, which the statute had otherwise provided for him. It was soon after considered, that a further measure of indulgence might be safely conceded, and accordingly, by 5 Will IV., ch. 3, it was provided that insolvent debtors in execution for sums not exceeding £20, exclusive of costs, might receive their discharge after three months' custody in goal, or twelve months' confinements on the limits, and for sums exceeding £20 but under £100, and for sums over £100, on six or twelve months' confinement in gaol, respectively; such discharge, however, being always contingent on its appearing satisfactorily to the court that they were not possessed of any property, that they had made no fraudulent or secret assignment of it, to prevent it being taken in execution, and that they were guilty of no fraud, deceit, or dishonest practice in contracting the debt, and the debt in no case being released by the release of the debtors, but remaining in full force against any of their after-required property, in the same manner as if they had never been taken in execution, and the court having the power of re-committal if the discharge had been effected through fraud. May we not well ask, did not these statutes give sufficient indulgence to the insolvent debtor? Immediately upon his arrest he might obtain his weekly allowance; if it were not paid, and his answers to any interrogatories exhibited to him were satisfactory, he was discharged; if paid, the plaintiff must have still have proceeded to judgment against him in the usual course and after judgment, and being charged in execution, he could under no circumstances

be detained in custody in gaol for more than a twelvemonth, if he made the affidavit required by the statute, and had been guilty of no fraud or deceit in contracting the debt, or disposing of his property. And though it might be urged that the very taking the benefit of the insolvent acts incurs a kind of civil infamy, yet that, it should be remembered, arises not from the imprisonment of the debtor, but from his insolvency.

But we will now examine the new statute itself, and shew that there are many points in which it is defective, and does not afford even the shadow of the remedy, of which it professes to give the substance. We will take it up clause by clause, as well to offer suggestions to the practitioner upon any part of it on which we can bring authorities to bear, as to point out any errors or omissions which may be remedied by a future enactment, if the act itself should remain on the statute book. By the first clause it is enacted—

“ That from and after the passing of this act, no person shall be arrested or held to bail, upon any cause of action arising in any foreign country where the defendant would not have been liable to have been arrested or held to bail, had such defendant continued within the jurisdiction of the courts of such foreign country, or in any civil suit where the cause of action shall not amount to ten pounds of lawful money of this province ; and where the cause of action shall amount to ten pounds and upwards, it shall not be lawful for the plaintiff to proceed to arrest the body of the defendant or defendants, unless an affidavit be first made by such plaintiff, his servant or agent, of such cause of action, and the amount justly and truly due to the said plaintiff from the said defendant, and also that such plaintiff, his servant or agent, hath good reason to believe, and doth verily believe that the defendant is immediately about to leave the Province of Canada, with intent and design to defraud the plaintiff of the said debt ; and that no person shall be taken or charged in execution in any such action for any sum whatever, whether the party shall originally have been held to bail, or been merely served with common process.”

The first change created by this clause is, the taking away the power of arrest in this province, where that power does not exist in the state or country where the debt was contracted, or cause of action accrued. This was once considered law in England, as stated in the judgment of the court in the case of *Melan v. Fitz. James*, 1 B. & P. 141 ; but that judgment was dissented from by *Heath, J.*, and *Lord Ellenborough* afterwards, in *Imlay v. Ellefsen*, 2 East., 456,

expressed his approval of that dissent, but the decision was never expressly over-ruled, although the better opinion seems to be against its validity, though it has been maintained by a late text writer, Petersdorf on Bail, 27. It will be difficult, however, for defendants to avail themselves of this provision where it is applicable, as it would seem from the case above, in 1 B. & P., 141, that an affidavit should be made on the part of the defendant that arrest has never been allowed in a similar case in the country where the cause of action accrued, or that a copy of the law by which it is disallowed should be produced to the court. The new form of affidavit is much more stringent upon the creditor than the old; but it does not require any vexatious or malicious motive in the proceeding to be negatived on the plaintiff's part, although a question may, and probably will arise, whether that conclusion of the affidavit is not still necessary. This form of affidavit, we consider, is not applicable where the plaintiff is obliged to obtain a judge's order to arrest in actions sounding in damages, either in contracts or torts, as it requires that the plaintiff, &c., should swear to the defrauding of the *debt*; and it has been held in the Court of Queen's Bench, in Upper Canada, that under the 14th clause of 2 Geo. IV., ch. 1, which permitted an arrest on an alias bailable writ during the pendency of the action, where the plaintiff swore that he was apprehensive that the defendant would leave the province without paying his *debt*, that a defendant could not be arrested on an alias writ after serviceable process, where the action was brought to recover damages, and the intervention of a judge was required to procure an arrest.—Ross v. Urquhart, M. T., 1843. Cameron's Rules, 86. And it would seem from clause 6, that in actions *ex delicto*, after judgment, the defendant may be imprisoned in the discretion of the court, if he does not pay the damages and costs awarded against him, without any affidavit being made by the plaintiff; and the involuntary trespasser may suffer the punishment of imprisonment without any affidavit being made against him, while the fraudulent debtor may escape, because his creditor cannot swear that he believes that it is his intention immediately to depart the province to defraud him

of his debt. The conclusion of the clause takes away the power of taking or charging a defendant in execution, in any such action as is mentioned in the former part of it, whether the suit was commenced by bailable or serviceable process.

Sections 2 and 3 explain the charge from the existing law.

Section 4 abolishes the arrest of females for debt.

Section 5 gives a new form for recognizances of bail.

"5. And be it enacted, That whenever any person shall be holden to bail in any form of action whatever, the recognizance of bail shall be taken in double the sum sworn to, and shall be subject to the condition, that if the defendant or defendants shall be condemned in the action, and shall neglect or refuse to pay the costs and condemnation money, or to appear personally in open court, or before any judge or commissioner of the court wherein such bail shall be taken, when thereunto required by notice to be left with either of such bail and with the defendant, or at his or their last place of abode, at least twenty days before the day on which he shall be required to appear, and there to answer such questions or interrogatories as shall be propounded to him touching his lands, tenements, goods, chattels, money, rights or credits, then and in such case the bail will pay the costs and condemnation money for him."

This clause effects a most important change in the position of bail with respect to their principal. The condition of the recognizance of bail under the old law was, that the debtor should satisfy the costs and condemnation money, or surrender himself, or that the bail would do so for him; and it was always in the option of the bail to discharge themselves by the surrender of their principal, for which purpose they were armed with the power of arresting him, and giving him up to the custody of the sheriff of any district, in which he might be found, however much the surrender might be against his inclination.

But by this law the power is taken away from the bail altogether. It is true that no man can be forced to become bail for another, but whoever does, must enter into the recognizance with the certainty of the ultimate payment of the debt and costs falling upon him, as the alternative of giving notice for the debtor's appearance must rest with the plaintiff, an alternative which he will be slow to exercise, when he can at once make the bail responsible for the whole amount of his debt and costs under the condition. It may be said, that as arrest is to be allowed only where

the creditor swears to the fraudulent intent of the debtor to depart from the province without paying the debt, and as the act is aimed against fraudulent debtors, that it is right that the bail should incur the additional responsibility ; but why leave the power of exercising this increased responsibility in the hands of the plaintiff ? he can give or omit to give the notice at his pleasure, and the bail might as well be bound to perform the single condition of paying the debt and costs, as have an alternative offered to them, which they will never be called upon to perform, and which “keeps the word of promise to the ear, but breaks it to the hope.” But it cannot be urged as a reason for this change in the condition of bail, that the act is aimed against fraud, for if the alternative were pursued, the court must adjudge the debtor guilty of fraud, before he can be punished ; and with what reason or on what principle can it be contended that the bail ought to be made to pay for a supposed fraud of the debtor, arising only from the creditor’s belief, as expressed in the affidavit of debt, when if the proceeding is carried on by interrogatories administered to the debtor himself, the court must be satisfied of the fraud, before it can proceed to punishment. We would suggest that the condition of the recognizance should remain as it was under the former law, but that it should be also made imperative on the plaintiff within some certain period, after the voluntary or compulsory surrender of the debtor, to exhibit interrogatories to him, upon which proceedings should be taken according to the next clause of the act. But the condition of the debtor is worse even than that of the bail. Formerly he could surrender himself and discharge his bail ; now, even although he may have the will to relieve them, he has not the power, and a tacit approval is given to an apparent fraud by the very law, which is intended to provide for the punishment of the fraudulent contracting of debts. How may this operate upon the debtor ? if he could relieve his bail by his own act, or if they had it in their power to protect themselves by his surrender, he might escape imprisonment ; but he cannot ask for assistance, when the ruin of his friends may be the consequence of its being granted : and upon the suspicion of his creditor he must languish in

gaol, until relieved as an insolvent, when the aim and intention of the act might have been presumed to be, to save him from the penalty of imprisonment, until the court had pronounced him guilty of fraud.

“ 6. And be it enacted, That if such defendant or defendants upon examination upon oath, either upon interrogatories, or *viva voce*, in open court or before a commissioner of the court in which the suit shall be pending, or upon examination in like manner of any witness or witnesses for either party, shall appear to the said court to have acted fraudulently, either in the manner of contracting the engagement upon which the recovery shall have been had, or in evading the satisfaction thereof, or if, in causes arising *ex delicto*, the defendant shall neglect to pay the damages and costs recovered in any such action ; or if such defendant or defendants shall refuse to make a full discovery of all his or their lands, tenements, goods, chattels, credits and other effects, (and to assign to the plaintiff or plaintiffs the whole or such part thereof as the said court shall direct, in or towards the satisfaction of the judgment obtained in the said suit), then and in either of the said cases, it shall and may be lawful for said court to commit such defendant or defendants to the common gaol of any district until he or they shall comply with the order of the said court, or finally for such period not exceeding one year, as the said court shall think reasonable in punishment of the fraudulent conduct of which they shall adjudge such defendant or defendants to have been guilty, or in punishment of the tort for which damages shall have been awarded, if they shall deem it proper so to do ; Provided always, That such commitment shall not operate as a discharge of the said judgment, but the same shall continue in force in like manner as if the defendant or defendants had not been committed : And provided also, That it shall and may be lawful for the court wherein any such recognizance of bail shall have been entered in term time, or for a judge thereof in vacation, after any defendant or defendants shall have submitted to any such examination as aforesaid, or in case no such examination shall be had within two terms after judgment shall have been signed in any such cause, then upon hearing the parties, to order in their discretion *ae exoneretur* to be entered upon such bail piece.”

This section gives the power of punishment to the court, by the imprisonment of the defendant, for a period not exceeding a year, when he shall appear to have acted fraudulently either in contracting the debt, evading satisfaction of it, refusing to disclose his property or assign part of it according to the direction of the court to the creditor, or in actions *ex delicto* he shall neglect to pay the damages and costs adjudged against him—his commitment, however, not in any case to discharge the judgment; and the court or a judge having power to order an *exoneretur* to be entered on the bail piece, where he has either submitted to the examination, or no examination

has been had within two terms after judgment. This clause, it will be observed, is applicable only where the defendant has put in special bail; where he has been unable to find bail, he must seek for relief under the old insolvent acts, or remain in prison until discharged by supersedeas, and his prospect of release by procuring bail after he has once been imprisoned, must be much less than under the old law, as he cannot be surrendered to meet the judgment.

"7. And be it enacted, That should any person have been or hereafter be committed to prison upon any attachment or other process issued by any court of law or equity in Upper Canada for a contempt or otherwise in not paying costs, or any other sum of money directed or decreed to be paid by such courts, respectively, it shall and may be lawful for such person to give notice to the party at whose instance such attachment or other process shall have issued, that application for his discharge will be made to the court or a judge thereof, whence such attachment or other process shall have issued, whereupon it shall be lawful for the party at whose instance he shall have been committed as aforesaid, within ten days after the service of such notice to exhibit interrogatories to such person so applying for his discharge, or to any witness or witnesses, in like manner as if such party were committed in execution on a judgment as aforesaid.

"8. And be it enacted, That, upon such interrogatories being answered it shall be lawful for such court or judge, to make such order thereon as if such party had been charged in execution upon a judgment as aforesaid: Provided always, That no such order of such court or judge so to be made as aforesaid, shall discharge the party so in custody on such attachment or other process, from the payment of the sum which such party had been directed to pay as aforesaid; but that the same shall be levied and collected by such process against the lands, tenements, goods, chattels, moneys, rights and credits, as the superior courts of law and equity shall prescribe in that behalf."

By these clauses a party committed to prison for a contempt for not paying money or costs, may be discharged upon notice, by answering interrogatories to be exhibited to him, in the same manner as if he were "committed in execution as aforesaid." Now when we examine the former clauses of the act, we find that it is under the sixth that the commitment in execution may take place, but that the interrogatories there required to be exhibited are *before*, not *after*, the commitment; and there is no clause in the act by which according to the *letter* of the seventh section, interrogatories could be administered by the party holding the attachment, although by its *spirit*, the commit-

ment in execution might either be held to apply to such commitment as could have been had under the former law, and interrogatories would then be administered under the insolvent acts; or the conclusion of the clause would be read as if it were, "*were to be committed in execution.*" The same error is carried into the eighth clause, as by its provisions, the court or a judge will make such order upon the interrogatories being answered as if the party attached had been charged in execution upon a judgment as aforesaid. The expression is varied in this clause, "*charged in execution*" being more applicable to proceedings before, than since the passing of the act, although the commitment on a judgment by the court may be probably considered as a charging in execution; but what is the nature of the order that may be made under the prior clauses? that an exoneretur may be entered on the bail piece; and how such order can be beneficial to a person confined in prison on an attachment, must be left to the framers of the law to explain.

"9. And be it enacted, That no person shall hereafter be arrested or held to bail on any process of attachment for contempt for the non-payment of costs merely, which shall or may be ordered to be paid in the progress of any suit either at law or in equity, but that in lieu of any such process, it shall be lawful for her Majesty's superior courts of law and equity, to prepare and adapt to the circumstances of the case, such a form of execution, attachment, warrant of distress or other process, against the lands and tenements, goods, chattels, moneys, debts, credits and effects of any person so ordered to pay such costs, as to such courts shall seem meet."

This clause takes away the power of arrest on attachment for interlocutory costs, as the words "*costs ordered to be paid in the progress of any suit,*" are clearly not applicable to costs finally adjudicated upon by the court, or given to a party by the terms of an award.

We have now analyzed the act, and we think that it must appear as strange to our readers as to ourselves, that though confessedly intended for the benefit of the imprisoned debtor, its provisions are only applicable (except in cases of attachment) to the debtor, who has been fortunate enough to procure bail; and all the hardship which it has been contended existed under the old law, must still be suffered by the man who has no friends who are willing

to become his bail, and who must take the benefit of the insolvent acts in order to procure his release. We conceive that the difficulties in the way of the smooth working of the statute in its present shape are innumerable, and a repeal, or alteration in its provisions, must soon be loudly called for. The creditor stands unprotected against the man who may choose to remain a prisoner in close custody, after having fraudulently and dishonestly become his debtor; interrogatories cannot be administered to him under this act; he cannot be compelled to answer under the insolvent acts, if he does not choose to apply for relief under them, and as the creditor has no power to charge him in execution, he must be inevitably discharged by supersedeas, two terms after judgment had been obtained against him. The act establishes a premium for fraud: a penalty is affixed, but when the punishment has been suffered the defaulter is free; he may have ruined a tradesman—he may have incurred debts that he has not the means, and has never had the intention to pay; he knows that he can be decreed to lie in prison for a year, but that he considers but as a punishment that may perhaps be evaded, and if suffered, that there is a definite period when he must be released. Talk to him of his after-acquired property being chargeable, and he will laugh in derision; he knows that as soon as he is released, he is free to go wherever he may please, and the ruin of his creditor may be all that will remain to tell the tale of his dishonesty and fraud. Can it be said, that a law that may produce such results is not prejudicial to the morals of the community? and will it not be beneficial to society that it should be swept from the statute book? especially as its machinery is too cumbrous to allow of its working well. The court is to decide whether the debt has been fraudulently contracted; but how is the examination to be conducted, or on what basis is the decision to be made? Must the fraud be deliberate to cheat the creditor? or may the debtor be properly charged with it, if he makes an engagement which is beyond his available means, but which he may hope by some fortunate circumstance to meet? Is the man who draws a bill on a relative in England, who is under no obligation to pay it, but which he may ex-

pect will be honoured, to be treated as a sharper, because it is returned under protest ? and must not the court have all a man's private affairs under consideration, before they adjudge him guilty of any, except the most deliberate fraud, in contracting the debt ? These are questions which are not easily answered, and we must trust to time for their solution. We cannot conclude this article without drawing attention to the retrospective operation of this act, as a most serious objection to it, and one which we hope we may not again have to urge against any statute effecting a change in the law. Creditors *may* feel that their interests are but lightly regarded now, in the remedies that are open to them for recovery of future debts, but they *must* feel that they have been harshly dealt by, not only in refusing to them the means which existed when the act was passed, of enforcing obligations, which were contracted on the faith of the power of arrest given to them under the old law, but in actually depriving them of that remedy, when they had commenced their proceedings before the statute—the Court of Queen's Bench having decided during last term, that a defendant can neither be taken in execution on a judgment entered, (a) nor arrested on mesne process on an affidavit made, before the statute was passed. (b)

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LAW REFORM.

During the last quarter of a century there have been so many legal reforms in England, that it would almost seem strange, that in the great desire that has been exhibited in this colony for a departure from old forms and antiquated prejudices, and for an exact similitude and transcript of the British constitution, our laws should not have undergone corresponding alterations ; but although the criminal law of England was introduced into Canada before its division into

(a) Bank B. N. A. v. Clarke.

(b) Bruce v. Scholfield.

two provinces, in the fourteenth year of the reign of George III., and the very first act of the legislature of Upper Canada, after the division, was to make the law of England as it then stood—excepting such parts of it as related to ecclesiastical rights or dues, the poor and bankruptcy—the rule of decisions in all questions of property and civil rights; yet, since that period, our legislative enactments for the amendment of the law have by no means kept pace with the changes at home; most, if not all of which, have proved highly beneficial, though some of them, of course, are adapted to a more artificial state of society than that which exists in this country. It is quite true, that it has always been found difficult, if not impossible, to transplant into a new colony all the laws existing in the parent state at the time the colony was founded, although the main principle, which has been applied both to colonies acquired by conquest, and to colonies planted and settled by the parent country, has been, that in the former, the laws of the mothercountry prevail as they existed at the time of the conquest, without any of the alterations that have been subsequently made; and in the latter, the common law of England is in force, with so much of the statute law as existed at the time of its foundation. By this, we are not to be understood to mean, that the laws of the conquered country are no longer to guide in questions of property or rights between the conquerors and the conquered after the conquest—there must assuredly remain, until they are expressly repealed; and although Lord Stowell, in *Ruding v. Smith*, 2 Hag. C. C. C., 389, has thrown a doubt upon the subject, yet as the language he made use of was not directed to the point at issue, but may be considered merely extra-judicial, it cannot have the same weight that would be attached to any express decision of his on a question of international law. “I am yet to seek,” he says “*for any principle derivable from general law, which subjects the conquerors of a country to the legal institutions of the conquered.*” Such a principle may be attended with most severe inconvenience in its operation. The law may be harsh and oppressive in the extreme; may contain institutions abhorrent to all the feelings, opinions, and habits of the conquerors; at any rate, they can be

but imperfectly understood; and that they should all of them, instantaneously attach, and continue obligatory upon them, till their own government had time to learn them, and select and correct them, is a proposition which I think a professor of general law would be inclined to consider cautiously, before it could be unreservedly admitted." But we do not propose to discuss the principle, as applied to conquered country, in this country, in this article, as our object only is to support the expediency of a more distinct adoption of the late changes in the law in England, to maintain the principle which was introduced in the first legislative enactment of Upper Canada, of making the laws of the mother country the rule of decision in all matters of controversy relative to property and civil rights. But although the legislature, at so early a period, determined that the English law should form the rule of decision, in all questions except those which were expected in the enactment, the court has frequently determined since, that particular statutes, which either were provided for local purposes, or were not applicable in their provisions to the circumstances of the colony, were not in force, and by those decisions have placed the law of the colony on very much the same footing as it would have stood, if the English law had never been formerly introduced; as, according to Blackstone, 1 Com. 107, "Colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the prosperity of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force."

The power of our Court of Queen's Bench to resist the general terms of the provincial law, has been much questioned; and a case is now pending before the court, in which the application of the statute of Henry VIII., against buying disputed titles, will be discussed, and will probably

ensure an express adjudication upon the point. There certainly are not many authorities to be found on the subject, but such as there are would seem rather in favour of the exercise of the power ; as Lord Mansfield says, in *Campbell v. Hall*, 20 Howell's St. Tr., 289,—“ It is absurd, that in the colonies they should carry all the laws of England with them. They carry such only as are applicable to their situation. I remember it has been determined in the council. There was a question whether the statute of charitable uses operated in the Island of Nevis. It was determined it did not: and no laws but such as were applicable to their condition, *unless expressly enacted*.” And the only difficulty would then seem to be, whether the provincial statute should be considered as an *express enactment*, or ought only to be treated as a declaration, that the English common and statute law, *as far as applicable*, should be in force ; as otherwise, on the division of the colony, the feudal jurisprudence of Normandy, which the French introduced into Canada, and which remained as guaranteed after it became a British colony, would have continued to prevail in the Upper Province, and might have checked that growth and prosperity which the freer laws of England have promoted and cherished. There is, it will be observed, a great difference between the terms in which the criminal law was introduced and those by which the law was made applicable in questions of property and civil rights ; the former being by positive enactment of the imperial parliament, and therefore leaving little, if anything, to construction ; while the latter merely pointed out from whence the rule of decision was to be taken, and may therefore be considered as having left it to the courts to determine, whether any particular statute was applicable to the circumstances of the colony, and ought to be declared in force. Very many of the English statutes which have been passed for the amelioration of the law, since Upper Canada became a separate province, have been adopted by our legislature ; and, among these, the 4 Will. IV., ch. 1, commonly called the Real Property Act, and 7 Will IV., ch. 3, for the amendment of the law, have been the most decidedly useful ; the former having been in several particulars carefully adapted

to the circumstances of the province by the present Chief Justice of Queen's Bench, while speaker of the Legislative Council, and the latter having introduced several beneficial alterations, which were found to be as necessary in the colony as in the mother country; but, with the exception of these two principal statutes, we have by no means availed ourselves of the advantages which have been offered to us, by the adoption of those changes in the law of England, which in their practical working, have been attended with most satisfactory results. Changes in the law can seldom if ever be made with benefit, if left to be effected by the efforts of any particular individual in the legislature, as that time and consideration can scarcely be given to them which is likely to ensure their complete success; and instances have occurred frequently, in which men eminent in the legal profession have introduced bills into parliament which have not been attended with the happy consequences which were expected from them. It is not to be supposed, that the judges of the land, who are the persons most fitted from their experience and position, can spare the time or find the opportunity of revising existing laws, or framing new ones; and as the services of men in the practice of their profession cannot be obtained gratuitously, it must always be necessary for the government of the country to make a selection of persons upon whose abilities reliance can be placed for the performance of a work in which the public have so momentous an interest, as in the revision and alteration of the laws. Now, this is the course that has been adopted in England; the common law commissioners, the real property commissioners, the criminal law commissioners, have all been busy in their respective vocations, and the result of their labors has been the production of a body of law in their several departments, which has removed doubts upon many disputed points, settled customary law, and destroyed the doctrine of presumption, by positive enactments. It is by the labors of such men as were engaged on these commissions, that beneficial alterations might be expected to be made; and very many of the statutes which have been founded on their reports might be wisely placed on our statute book, as by their exertion the law has

been pruned and made ready, as it were to our hands, so that, without expense or inconvenience to the colony, their work may be made as available, as though it had been prepared expressly for our use. The basis of our law is the English common and statute law as they existed in 1794; we use the works of English text writers, and are guided by the decisions in the English reports, and each day therefore that we suffer to pass, without the adoption of such alterations as have been made at home, removes us farther from those landmarks by which we ought in a great measure to be guided, and sees us behind the spirit of the age in which we live. The amendments in the law of evidence have been considered of so much importance, that many of them have been readily adopted hitherto, but there are several others which seem to have passed over unheeded, although the necessity for their introduction must be and is constantly felt as well in criminal as in civil proceedings.

In this country, a party whose name is forged to a written instrument, and who must of necessity be capable of giving the clearest evidence to disprove the genuineness of the handwriting, is not a competent witness in a criminal prosecution to establish the forgery, and this conclusion originally proceeded upon the erroneous supposition that the witness would be discharging himself of his liability by the conviction: and that the record of the conviction might be given in evidence for him in an action upon the forged instrument; for where this reason could not be applied, it was an invariable rule that the person whose name was forged should be admitted as a competent witness, and strange to say, that in neither case did it apply to his exclusion in a civil suit. In England the dissability of the witness was removed by 9 Geo. IV., ch. 32, but although fifteen years have elapsed since, and not a year passes by, without some case arising in which the rule of exclusion has to be observed in our courts, yet no attempt has been made to effect the alteration; and nearly the whole body of the amended criminal law has been introduced into united Canada without a single thought being given or provision made, to effect this very necessary change. The English statute of wills, 1 Vic. ch. 26, has also made some important alterations

in the law of evidence affecting the proof of the execution of wills, which are not now void by reason of any incompetency either present or future, of the attesting witnesses, and which may be proved by either the creditors or executors of the testator; but this statute has never been a part of our law, and the imperial act 3 & 4 Will IV., ch. 49, allowing the affirmations of Quakers and Moravians in all cases in which oaths were before required by law, has not been introduced, although the act allowing their evidence on affirmation to be taken in criminal cases has found its way to our statute book, but still continued their exclusion from sitting on juries in criminal cases. Why these statutes have not been incorporated in our law, we cannot say; we should wish to see them, and all other statutes relating to evidence and the admission of witnesses, which are in force in England, prevailing here, as there can be no reason, either from our circumstances or position, why the rules of evidence, and of the admission of witnesses, which prevail there, should not also be in force with us. A most important change has been made at home in the law of evidence, by 6 & 7 Vic., ch. 85, by which the exclusion of witnesses, by reason of incapacity from crime or interest, will for the future be prevented, and the reception of their evidence allowed, subject, as it may always be, to the questionable credit which may be attached to it. Lord Brougham has said of this act—"It is certainly the greatest measure that has been carried, under the head of judicial procedure, since the Statute of Frauds; that is, since the Restoration. It places the law of evidence at length upon a rational footing, and makes its provisions consistent with themselves. It protects judges and juries and parties from the miscarriages heretofore constantly produced by the exclusion of important testimony; wisely opening the door to the witness, but reserving the estimate of his credit, and the value of his evidence, to those who are to judge the cause. It also sweeps away the numberless nice and subtle distinctions in which the profession was wont to luxuriate; disencumbers our jurisprudence of a heavy load of useless decisions resting upon refinements and not principles; and abridges the trial of causes by shutting out those debates that

used daily to arise before, upon the admission of proofs, which the common sense of mankind at once pronounced should be received, and which the law itself did receive in other instances, not distinguishable by the eye of plain reason. There have been few greater improvements in our judicial system, than those which are effected by this valuable statute."

There is nothing contained in this statute which is not applicable to our condition; it is as important for us as it can be for any other country, that in matters of evidence, the objection should lie to the credit, not to the admissibility, of the witness, and that some of the anomalies by which this branch of our law has been distinguished should be removed. A rapid advance has been made in the right direction in the mother country, and the colony should not be slow in following her footsteps. In the practice of the courts, there have been as many beneficial alterations as in other branches of the law; and although our system was placed on a very simple footing in the year 1822, and was pruned of many of the incongruities and absurdities that then existed in the procedure of the English courts, yet as the new forms of process and proceedings at home are even more simple, and ensure a more speedy recovery in execution, they might be most advantageously adopted by us. The late acts relating to costs; the Prescription Act, 2 & 3 Will. IV., ch. 21; the act requiring a written promise to take a case out of the Statute of Limitations, 9 Geo. IV., ch. 14; the act consolidating the laws respecting attornies and solicitors, 6 & 7 Vic., ch. 73; the several acts relating to bills of exchange; all of which have been the subject of much consideration in England, should be introduced into Upper Canada. We think that as the English common law is ours—that as we have embraced also so large a portion of the English statute law, that we ought not to depart from the principle which our legislature at so early a period adopted. We would not indiscriminately adopt all the changes made in the law in the mother country, but we would be prepared to select such as seemed likely to work well, and we would have no time lost in appropriating those that had worked well already. The nearer that we keep to

the English system, the more likely we are to ensure to our laws the highest degree of perfection; and when we reflect that it is to English books that we turn for authorities, and by English forms and precedents that we are mainly guided, we ought to be careful that our laws are assimilated as nearly as may be to those of the country from whence our stories of information and authority are drawn, and that we are not obliged to turn to by-gone years for decisions upon a point, which a more liberal spirit, or a better adaptation to a higher degree of civilization, may cause us to seek for in vain in latter and more enlightened times.

CASES IN THE ENGLISH COURTS.

Doe Dem. SIMPSON v. HALL.

3 Dowl. N. S. 49.

A Judge at nisi prius may, under the Stat. 3 and 4 Wm. IV. c. 42, s. 23, amend a declaration in ejectment by an alteration in the date of the demise, whether the day laid in the declaration is a wrong day or an impossible.

Channell, Serjt., moved for a rule to shew cause why the verdict which had passed for the lessor of the plaintiff should not be set aside, and a new trial had, upon the ground that the learned judge who tried the cause, Mr. Baron Parke, had improperly made an amendment in the date of the demise laid in the declaration.

The ejectment was tried at the last York spring assizes, and evidence was taken for the purpose of shewing that the defendant's tenancy had expired on Old Lady Day, 1842. The demise in the declaration was laid on the 30th of May, in the sixth year of Victoria, *i. e.* the 30th of May, 1843, a day which had not then arrived. The learned judge amended the declaration by substituting the word "fifth" for "sixth" of Victoria.

Channell, Serjt., now contended that this was not a *variance* between the proof and the record, which it was in the power of the judge to amend under the provisions of the stat. 3 & 4 Wm. IV., c. 42, s. 23. The declaration was bad on the face of it, independent of any evidence, and in this respect it was

distinguishable from the case of *Doe dem. Edwards v. Leach*. (a). There, the demise was laid a day too soon, and it was held, that it was competent to the judge at nisi prius to amend the declaration, by substituting a day on which the right of entry was complete. The original lease, also, which reserved the power of re-entry, was produced in that case at the trial, and therefore there was a variance between the evidence given and the statement on the record, which was a proper subject for amendment. It did not clearly appear, however, in the present case, that any evidence was given from which the learned judge could amend the declaration.

TINDAL, C. J.—Before we grant you a rule, we will apply to my brother *Parke* for his notes, and see whether they furnish any evidence by which the declaration might have been amended.

On a subsequent day, *Tindal*, C. J., said “ We have seen my brother *Parke*, and it appears, that a copy of the notice to quit was read at the trial. We think, that the judge at nisi prius may direct an amendment to be made, whether the day named in the declaration is a wrong day or an impossible day ; and that, therefore, no rule ought to go.

Rule refused.

BRAITHWAITE v. HARRISON.

3 Dowl. N. S. 210

Where, in an action on a bill of exchange by the indorsee against the acceptor, the declaration alleged that “ one J. Bankes ” made his bill, &c., and the defendant demurred thereto, on the ground that the Christian name of Bankes ought to have been set out in full, or that it should have been alleged that he was designated by the initial letter only in the original instrument, the Court set aside the demurrer as frivolous.

ERLE moved for a rule, calling upon the defendant to shew cause why the demurrer to the declaration in this action should not be struck out on the ground that it was frivolous. It was an action by the endorsee against the acceptor of a bill of exchange ; and the declaration stated, for that “ whereas heretofore, to wit, on the 28th of February, A. D. 1843, one J. Bankes made his bill of exchange in

(a) 9 Dowl. p. 877, O. S.; S. C. 3 Scott, N. R. 509 3 Man. & G. R. 229.

writing, and thereby required the defendant to pay to his order," &c. To this declaration the defendant had demurred, upon the grounds: first, that the Christian or first name of the person in the declaration mentioned, as the drawer of the bill of exchange on which this action is brought, is designated by the initial letters only, whereas, the said Christian or first name of the said person should have been set out in full, or it should have been alleged, that the said drawer of the said bill was designated by the said initial letter only of his Christian or first name; secondly, that the declaration was ambiguous, for that it was uncertain whether it was intended to be alleged that the bill was payable to the order of J. Bankes, or the defendant.

Kelly shewed cause. The 3 & 4 Wm. 4, c. 42, s. 12, provided "that in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold bail, and in the process of declaration to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full." These provisions were conditional, and unless the contraction was used in the bill itself, a declaration employing only the initial letter or a contraction would be bad. It was the duty, therefore, of the plaintiff, in order to establish his right to use the contraction, to allege that the party signing the original instrument was so designated. The objection could only be taken by demurrer; for if not so taken, it could not be raised at the trial with any other result than an amendment under the 23rd section of the statute, *Bird v. Holman* (a), was like this case. There, to a declaration in debt for a non-payment of money, pursuant to a covenant in a "deed of apprenticeship," (so describing the instrument in the declaration), the defendant pleaded that the said indenture in the declaration mentioned is not his deed; and on special demur-

(a) 2 Dowl. p. 234, N. S.; 9 M. & W. 761.

rer, the court refused to set aside the demurrer as frivolous, and intimated their opinion that the plea was bad.

Erle, in support of the rule. It was consistent with the declaration, that in the original bill of exchange, the initial letter only of the Christian name of the drawer was used.—There was no precedent for a declaration in the form contended for.

WIGHTMAN, J.—I think that the declaration is good, and that the demurrer must be set aside. I had some difficulty in getting over the words of the act, which appear to be conditional, but I think the declaration must be taken to mean, that “J. Bankes” is so described in the bill. I cannot contemplate the possibility of an amendment at the trial. The defendant, however, may have leave to plead issuably, on taking short notice of trial, and on payment of costs.

Rule accordingly.

SMITH V. MARRABLE, Knt.

11 M. & W., 5.

It is an implied condition in the letting of a house that it shall be reasonably fit for habitation, if it be not (e. g., where it is greatly infested with bugs) the tenant may quit it without notice.

Assumpsit for use and occupation. Plea, non assumpsit. At the trial before Lord *Abinger*, C.B., at the Middlesex sittings after Michaelmas Term, it appeared that the action was brought to recover a balance of five weeks' rent of a furnished house at Brighton, which had been taken by the defendant of the plaintiff under the following agreement:—

Brighton, September 14, 1842.

“Mr. John Smith, of 24 St. James' street, agrees to let, and Sir Thomas Marrable agrees to take, the house No. 5 Brunswick place, at the rent of eight guineas per week, for five or six weeks, at the option of the said Sir Thomas Marrable.

“THOMAS MARRABLE.

“JOHN SMITH.

“The rent to commence on the 15th September.

“T. M.

“J. S.”

Under this agreement, the defendant and his family entered into possession of the house on Friday, the 16th of September. On the following day, Lady Marrable having complained to the plaintiff that the house was infested with bugs, he sent a person in to take means for getting rid of them, which however did not prove successful; and on the 19th, Lady Marrable wrote the following note to the wife of the plaintiff:—

“5 Brunswick Place, Sept. 19, 1842.

“Lady Marrable informs Mrs. Smith that it is her determination to leave the house in Brunswick place as soon as she can take another, paying a week’s rent, as all the bedrooms occupied but one are so infested with bugs that it is impossible to remain.”

On the following Thursday, the 22nd, the defendant accordingly sent the key of the house, together with the amount of a week’s rent, to the plaintiff, and removed with his family to another residence. Evidence was given to shew that the house was in fact greatly infested by bugs. The Lord Chief Baron in summing up, stated to the jury, that in point of law every house must be taken to be let upon the implied condition that there was nothing about it so noxious as to render it uninhabitable; and that if they believed that the defendant left the plaintiff’s house on account of the nuisance occasioned by these vermin being so intolerable as to render it impossible that he could live in it with any reasonable comfort, they ought to find a verdict for the defendant. The jury having found for the defendant,

Hayward now moved for a new trial on the ground of misdirection.—The alleged nuisance is no answer to this action, founded as it is upon a written agreement of demise for a longer period, but must, if true, be made the subject of a cross action. The rent is not in its nature divisible, and inasmuch as it cannot be said that there has been a total failure of consideration, the payment of a part of it is an admission of the tenancy. *Salisbury v. Marshall*,^(a) the defendant, who held a house under an agreement “to become tenant by oc-

(a) 4 C. & P. 65.

copying," was held to be entitled to show, in answer to an action for use and occupation, that the house was not in such a reasonable and decent state of repair as to be fit for comfortable occupation: but *Tindal*, C. J., there says, "I agree with the plaintiff's counsel, that if there had been a separate agreement to do these repairs, then the not having done them would furnish no defence." In *Granger v. Collins*(a), it was held that no duty arises out of the mere relation of landlord and tenant, in the absence of any special agreement, to protect the tenant against eviction by a reversioner.

But even if this be a defence to the action, it ought to have been pleaded specially. It cannot be denied that this agreement was at one time binding, and therefore the throwing it up for such cause is matter in confession and avoidance. *Waddilove v. Barnett*(b) is an authority in point. There a defendant, in answer to an action for use and occupation, relied upon a payment of rent made to a mortgagee in consequence of notice from him; and it was held that, so far as this defence related to rent which had accrued due previously to the notice, it was not admissible under non assumpsit, but ought to be specially pleaded. Here, in substance, the defence in truth is that there was fraud, expressed or implied, on the part of the plaintiff, in concealing from the defendant the fact of the existence of this nuisance.

PARKE, B.—This case involves the question whether, in point of law, a person who lets a house must be taken to let it under the implied condition that it is in a state fit for decent and comfortable habitation and whether the tenant is at liberty to throw it up, when he makes the discovery that it is not so. The case of *Edwards v. Etherington*(c) appears to me to be an authority very nearly the point. There the defendant, who held a house as tenant from year to year, quitted without notice, on the ground that the walls were in so dilapidated a state that it had become unsafe to reside in it; and Lord *Tenterden*, at nisi prius, held these facts to be an answer to an action by the landlord for use and occupation; telling the

(a) 6 M. & W. 458.

(b) 2 Bing. N. C. 538; 2 Scott, 763.

(c) Ry. & M. 268; S. C., 7 D. & R. 117.

jury, that although slight circumstances would not suffice, such serious reasons might exist as would justify a tenant's quitting at any time, and that it was for them to say whether, in the case before them, such serious reasons existed as would exempt the defendant from the plaintiff's demand, on the ground of his having had no beneficial use and occupation of the premises. The jury found for the defendant, and the court of King's Bench was afterwards moved for a new trial on the ground of misdirection, but they refused to disturb the verdict. There is also another case of *Collins v. Barrow*,^(a) in which *Bayley*, B., held that a tenant was justified in quitting without notice premises which were noxious and unwholesome for want of proper sewerage. These authorities appear to me fully to warrant the position, that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance; it rather rests in an implied condition of law, that he undertakes to let them in a habitable state. With respect to the second point, if the law be as I have stated, and the existence of such a nuisance constitutes a defence to the action, I think it is a defence which is clearly admissible under non assumpsit. This is an action for use and occupation, in answer to which it is competent to the defendant to shew, under the plea of non assumpsit, that there never was any such occupation by him of the premises as to render him liable in point of law. Not only is this a good plea, but it seems to me that it is the only proper plea in such a case, that a special plea embodying such a defence would be demurrable, as amounting to the general issue.

ANDERSON, B., and GURNEY, B., concurred.

Lord ABINGER, C. B.—I am glad that authorities have been found to support the view which I took of this case at the trial, but for my own part I think no authorities were wanted, and that the case is one which common sense alone enables us to decide. A man who lets a ready furnished

(a) 1 M. & Rob. 112.

house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact—unknown perhaps to the landlord—that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of plague or scarlet fever; would not the law imply that he ought not to be compelled to stay in it; I entertain no doubt whatever on the subject, and think the defendant was fully justified in leaving these premises as he did: indeed, I only wonder that he remained so long, and gave the landlord so much opportunity of remedying the evil.

Rule refused (*a*).

MARY WALKER V. GOLLING.

11 M. & W. 78.

Where an action is brought by a feme sole, who marries after the commencement of the suit, but before the trial, it is not necessary to sue out a scire facias, to make the husband a party to the suit.

F. V. Lee had obtained a rule calling upon the plaintiff to shew cause why the fieri facias issued in this cause, and all subsequent proceedings, should not be set aside, on the ground that, the plaintiff having married after the commencement of the suit, her husband had not been made a party to the record by scire facias. The plaintiff declared on the 23rd November; the defendant pleaded on the 1st December; on the 7th December the plaintiff married one John Pollitt; on the 20th, the cause was tried, and a verdict passed for the plaintiff; and on the 4th of January judgment was signed and execution issued.

Miller now shewed cause.—This is not a case in which it was necessary to have a scire facias to make the husband a party to the record. Here the marriage took place before the trial, and at a time when the defendant might have pleaded it in abatement puis darrein continuance. It is only where the marriage takes place after judgment that a scire facias is necessary. The correct rule is laid down in the note to

(*a*) See *Izon v. Gorton*, 5 Bing. N. C. 501; 7 Scott, 537: *Arden v. Pullen*, 10, M. & W. 321.

Underhill v. Devereux(a), that “if a feme sole obtained judgment, or if judgment be recovered against her, and she marry before execution, a scire facias must be brought by or against husband and wife, in order to execute the judgment.” He referred also to *Cooper v. Hunchin*,(b) *Doe v. Butcher*.(c)

F. V. Lee, contra.—In the case cited, no interest was conveyed out of the party by the marriage, the verdict being against the plaintiff. There the husband takes no interest in the verdict; but here a new interest intervenes. [Parke, B.—Suppose you had known of the marriage before plea pleaded, then certainly you must have pleaded it in abatement, and there would be no occasion for a scire facias. So also, if the marriage take place before the trial, the defendant should plead it puis darrein continuance.] The distinction which has already been suggested is taken in *Tidd’s Practice* (d), referring to *Woodyer v. Gresham*(e), *Penoyer v. Brace*.(f) *Morgan v. Painter*,(g) and *M’Neilage v. Holloway*.(h)

PARKE, B.—The form of the scire facias in the case of husband and wife, as given by Mr. Tidd, after reciting that the wife has obtained a judgment states that *afterwards* she intermarried; that would seem to show that the scire facias necessary only where the marriage takes place after judgment. Where it takes place before the judgment, I think the objection ought to be taken by plea. At all events, we ought not to interfere unless some distinct authority be brought before us, which has not been done.

Lord Abinger, C. B., Gurney, B., and Rolfe, B., concurred.

Rule discharged, with costs.

(a) 2 Saund. 72 i. note (4)

(b) 4 East, 521.

(c) 3 M. & Selw. 557.

(d) 9th edit. 1114.

(e) 1 Salk. 117.

(f) 1 Ld. Raym. 245.

(g) 6 T. R. 265.

(h) 1 B. & Ald. 218.

THE UPPER CANADA JURIST.

LAW OF INTERPLEADER.

The passing of the late Adverse Claims Act, 7 Vic., ch. 30, has placed the law of interpleader in Upper Canada on the same footing as it now stands in England, the Provincial on Statute being merely a transcript of the English Act 1 & 2 Will. IV., ch. 58. Previous to the passing of the act of last session, by the English common law, as it existed in this part of the province, the defendant in an action of detinue might compel rival claimants to interplead, but detinue having long since fallen into disuse, the only course that could be resorted to for the relief of persons sued, or in danger of being sued, by several rival claimants, was that of filing a bill in equity to compel the parties to interplead; and before a Court of Chancery was established in Upper Canada, there were no means whatever by which such a proceeding could be had, except by the formal course of proceeding by garnishment or interpleader at law. This statute, therefore, must prove highly beneficial; for, although it does not often happen that there is any necessity for a proceeding by interpleader, yet it must be most conducive to justice, when such a necessity does arise, that the party who has no interest in the subject matter claimed, but is made a defendant from the mere possession of the matter in dispute, should be allowed to withdraw himself from the contest, without having to decide upon the right of contending claimants, and without being put to the expense of proceeding by bill in equity, or by any of the ancient and disused processes of the courts of law. Numerous questions have arisen upon the British Statute, both as to the manner of procedure, and the parties who may interplead; and as most of them will probably arise under this statute in Upper Canada, we propose to collect in this article the various

decisions that have been made under the Interpleader Act in England, from the time that it was passed to the latest reported cases.

STAKEHOLDERS.

“Whereas it often happens that a person sued at law in Upper Canada for the recovery of money or goods, wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims, but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay; Be it therefore enacted, &c., that upon application made by or on the behalf of any defendant sued in her Majesty’s Court of Queen’s Bench for that part of this province called Upper Canada, or in any of her Majesty’s district courts in that part of this province, in any action of assumpsit, debt, detinue or trover, such application being made after declaration and before plea by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject matter of the action, in such manner as the court (or any judge thereof) may order or direct, it shall be lawful for the court or any judge thereof to make rules and orders calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim; and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorney, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters, as may appear to be just and reasonable.”

In what Cases and Actions the Courts will interfere.—It has been held that no relief can be obtained under the statute against a mere equitable claim, (a) though subsequent cases have thrown considerable doubt upon the correctness of that decision; (b) and although the statute does not take away the party’s remedy by bill of interpleader in equity, yet if he has proceeded in equity, the common law courts will not afterwards in general interfere. (c) The court cannot extend the remedy beyond the particular actions named, and have there-

(a) *Sturgess v. Clarke*, 1 Dowl., 505.

(b) *Putney v. Thring*, 5 M. & W., 425; 8 Dowl., 811, S. C.; *Frost et al. v. Haywood*, 2 Dowl., N. S., 801.

(c) *Arrayne v. Lloyd*, 1 Bing., N. C., 720.

fore refused to interfere when the declaration contained a count in the *case*, as well as a count in *trover*;(a) and sem-
 ble, that it should be shewn on what day the declaration
 was delivered in the cause,(b) and that no plea has been
 pleaded.(c) The statute does not apply to actions brought
 to recover unliquidated damages;(d) nor to *trover* for title
 deeds;(e) nor to a contested claim to a reward advertised
 for the apprehension of a felon,(f) though in the later case
 under similar circumstances a rule was granted;(d) and
 where the defendant having purchased cattle from the plain-
 tiff, accepted a bill in payment, with a blank for the name of
 the drawer, and remitted it by post to the drawer, and
 the bill came subsequently into the hands of B. & S.
 for a valuable consideration, and the plaintiff denying
 that he had ever authorized payment by an acceptance, or
 that he had ever received the bill or endorsed it, brought an
 action against the defendant for the price of the cattle, and
 B.&S.also threatened him with an action on the bill;it was held
 that the defendant was not entitled to relief.(h) The court
 cannot interfere for any person claiming an interest in the
 subject matter of the suit; therefore where a wharfinger,
 against whom an action of *trover* was brought, and who re-
 tained possession of the goods, the subject of the action,un-
 der a claim of lien, applied to the court that a third party
 who claimed in opposition to the plaintiff, should be made
 defendant in his stead and pay off his lien, the court thought
 the case not within the act, the defendant himself setting
 up a claim;(i) but if in a joint action of *trover* against two
 defendants, one of them claims no title to the goods, he is
 entitled to the benefit of the act.(j) And where certain bul-
 lion had been deposited by the plaintiff in the Bank of Eng-
 land, upon which the bank had paid the freight and char-
 ges; it being the custom of the bank to allow bullion to be de-
 posited with them by the importers, the bank paying the
 freight and charges upon it, and having a lien upon it for the

(a) Lawrence v. Matthews, 5 Dowl., 149.

(b) James v. Pritchard, 4 Jurist, 1038; 8 Dowl., 890.

(c) Frost et al. v. Haywood, 2 Dowl., N. S., 801.

(d) Walter v. Nicholson, 6 Dowl., 517. (g) Gay v. Pitman, 1 Jurist, 775.

(e) Smith v. Wheeler, 1 Gale, 163. (h) Farr v. Ward, 2 M. & W., 844.

(f) Grant v. Fry, 4 Dowl., 135. (i) Braddock v. Smith, 9 Bing., 84.

(j) Gladstone v. White, 1 Hodges, 381.

repayment of the money thus advanced, but making no additional charge to the owners, the court (a third party having claimed the bullion) held, that inasmuch as the bank did not seek to charge one party or the other, but only the bullion, the bank was entitled to relief.(a) And where goods consigned to A., and warehoused at the London Docks, were claimed by B., and the Dock Company having required an indemnity of A., the original consignee, before delivering them to him, A. refused, and brought an action of trover, with counts for special damage for the detention; on motion by the company for relief under the statute, B. not appearing upon due notice, the court held that the claim of B. against the company was barred; but that A. ought not, by reason of that act, to be precluded from recovering for his special damage, if any.(b) And where actions were commenced by two persons, claiming to be the lawful owners of a bill of exchange, against the acceptor, the court directed an issue to try who was lawfully intitled to recover on the bill, and relieved the acceptor from all claim in respects of costs.(c) And a sum of money having been deposited by the plaintiff, while sole, with the defendants, who were bankers, and they afterwards served with a notice by J. M. that the plaintiff was married to him, and that they should not pay over the money to her, and the plaintiff disputed the marriage, it was held that the case was within the statute.(d) The first section of the act does not apply to cases in which the party seeking relief has given to any other of the litigant parties a right against himself, independant of the property in dispute, and *semble*, that a foreigner residing abroad, cannot be called on to come and state his claim, under the act.(e)

The Rule and Subsequent Proceedings :—

“ 2. And be it enacted, That the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

“ 3. And be it enacted, That if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served

(a) *Cotter v. The Bank of England*, 2 Dowl., 728

(b) *Lucas v. London Dock Company*, 4 B. & Ad. 378

(c) *Regan v. Serle*, 9 Dowl., 193. (d) *Crellin v. Leland*, 6 Jurist, 733.

(e) *Patovni v. Campbell*, 3 Dowl. N. S., 397

therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from and under him, to be for ever barred from prosecuting his claim against the original defendant, his executors, or administrators, saving nevertheless the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff as to costs and other matters as may appear just and reasonable.

"4. And be it enacted, That every order to be made in pursuance of this act by a single judge not sitting in open court, shall be liable to be rescinded or altered by the court, in like manner as other orders made by a single judge.

"5. And be it enacted, That if upon application to a judge in the first instance or in any later stage of the proceedings, he shall think the matter more fit for the decision of the court, it shall be lawful for him to refer the matter to the court; and thereupon the court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by a rule of court instead of the order of a judge."

If part of the sum claimed by the parties has been paid to one of them before an adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holders applying for relief under the act.(a) On an application to a judge at chambers, an order having been made by consent of all parties to refer the cause on certain terms to the barrister, instead of an issue being directed, the court refused to grant a rule nisi for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers.(b) When a plaintiff in an issue directed under this act, does not proceed to trial, the court will not permit another person's name to be substituted without making the originally appointed plaintiff a party to the rule.(c) It is not necessary for an execution creditor, appearing upon a motion under the act, to produce an affidavit.(d) The court will not grant an interpleader rule to shew cause at chambers; but if drawn up to shew cause on a particular day, it may be enlarged to shew cause there.(e) Until the judgment in the action on the issue is obtained, neither of the parties is in general secure against future claims by the other for the same

a) Allen v. Gilby, 3 Dowl., 143.

(d) Angus v. Wooton, 3 M. & W., 310.

b) Drake v. Brown, 2 C. M. & R., 270.

(e) Anon, 2 Jurist, 620.

(c) Lydal v. Biddle, 5 Dowl., 244.

matter.(a) Until judgment is signed, money which has been paid into court under a feigned issue under this act, will not be allowed to be taken out by the successful party.(b) The rule to take the money out of court is nisi only in the first instance.(c) An issue directed under this statute is for the purpose of informing the conscience of the court as to whether the plaintiff or defendant is entitled to the goods in dispute; therefore, the court will not allow either party to give evidence of a *jus tertii*.(d) Goods seized under a *fi. fa.* issued by A. against B. are claimed by C. In a feigned issue between C. and A. to try whether the goods were, at the time of the seizure, the goods of C., it is competent to A. to negative the title of C., by shewing that the goods, though seized by A. and claimed by C., passed to the assignees of B., by relation to an act of bankruptcy committed by B. before the seizure, and before the conveyance under which C. claims.(e)

Costs.—If the party making the application under the statute acts *bonâ fide*, he will, in the first instance, be allowed his costs of the application out of the fund or proceeds of the goods in dispute, and the party ultimately unsuccessful will have to repay them.(f) Where the party was offered an indemnity and refused it, he was not allowed his costs;(g) and where the claimant does not appear on the application, the court will not order him to pay the costs of applying to the court, or such costs to be paid out of the fund in dispute.(h) An auctioneer, who is sued for deposit money received on a purchase, and who pays it into court under an order for the vendor and purchaser to interplead, is entitled, upon the termination of proceedings between vendor and purchaser, to receive his costs out of the deposit money.(i) Application by a successful party in an issue directed under this act, for costs, &c., may be made before judgment is actually signed;

(a) *Cooper v. Lead Smelting Company*, 1 Dowl., 728. (b) See *Id.*

(c) *Stanley v. Perry*, 1 H. & W., 669.

(d) *Carne v. Brice*, 7 M. & W., 183; 8 Dowl., 884.

(e) *Chase v. Goole*, 2 M. & Gr., 230.

(f) *Parker v. Linnett*, 2 Dowl., 562; *Cotter v. Bank of England*, 2 Dowl., 728; *Duer v. McIntosh*, 2 Dowl., 730; *Pitchers v. Edney*, 4 Bing., N.C. 721.

(g) *Gladstone v. White*, 1 Hodges, 386. (h) *Lambert v. Cooper*, 5 Dowl., 547.

(i) *Pitchers v. Edney*, 4 Bing., N.C., 721.

but the rule cannot be drawn up except on condition of its being signed. (a) A stakeholder who *bonâ fide* comes to the court under the act, is entitled to his costs out of the fund or subject matter in dispute, to be repaid by the party ultimately unsuccessful. (b) Where a party succeeds under an issue directed by the court, he has a right of his costs of applying to take the proceeds of sale out of court, although he has not applied to the opposite side for a consent to take the money out. (c) So the successful party, as against the unsuccessful, is entitled to the costs of applying to the court, in order to obtain the property in dispute from the stakeholder; an application having been made to the latter, and he having properly awaited the decision of the court before he gave it up. (d) An issue was directed under this act between the claimant and an execution creditor, the costs of the issue to abide the order of the court. The claimant claimed the whole of the goods seized, but proved his right to part only. Held, that he was entitled, notwithstanding, to the general costs of the issue, as if he had been plaintiff in trover; and also to the costs of the original and subsequent application to the court. (e) The defendant being sued for rent arrear, and having received notice from a mortgagee not to pay the rent to the plaintiff, obtained a rule for the mortgagee to interplead; the mortgagee having declined to appear to the rule, the court ordered that each party should pay his own costs of the rule. (f) Where in a feigned issue, directed under an interpleader rule, the plaintiff claimed £182, and recovered only £50; and a judge at chambers, in the exercise of the discretion given to him by the statute, directed each party to pay his own costs, the court refused to grant a rule to set aside the order. (g) Under an issue under this statute, to try the right to a bill of exchange, the *bonâ fide* owner of it is entitled to the amount of the bill and all costs, from the wrongful claimant, so as completely to indemnify himself. (h) Where there was a seizure

(a) *Bland v Delano*, 6 Dowl., 293. (b) *Reeves v. Barrand*, 7 Scott 281.

(c) *Merodith v. Rogers*, 7 Dowl., 596.

(d) *Barnes v. Bank of England*, 7 Dowl., 319.

(e) *Staley v. Bedwell*, 2 P & D., 309.

(f) *Murdoch v. Taylor*, 6 Bing., N. C., 293.

(g) *Ker v. Edwards*, 8 Dowl., 29. (h) *Jones v. Regan*, 9 Dowl., 580.

of the goods of a wrong person, under a *fi. fa.*, and an application for an interpleader order was postponed at the request of the plaintiff and the sheriff, and then the execution was abandoned: It was held, that the court had no power to grant the claimant his costs.(a) An issue was directed between A. the claimant, and B. the execution creditor, to try whether five horses, or one or some of them, were or was, when taken in execution, the property of A. The jury found that two horses only belonged to A. A. obtained a rule nisi for payment to him of the general costs of the issue, the costs of the application under the act, and the costs of the rule. The court gave neither party the general costs of the issue, nor the costs of the trial; but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed A. his costs of the application made under the act.(b) Where an application for an interpleader rule is made to a judge at chambers only, and not the court, has authority as to the costs of the proceedings.(c) The costs of an interpleader rule or not "expenses of the execution," within 43 Geo. III., ch. 46, sec. 5.(d)

SHERIFFS AND OTHER OFFICERS.

"6. And whereas difficulties sometimes arise in the execution of process against goods and chattels issued by or under the authority of the said courts, by reason of claims made to such goods and chattels, by persons not being the parties against whom the process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions, and it is reasonable to afford relief and protection in such cases to such sheriff and other officers; Be it therefore enacted, That when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after an action brought against such sheriff or other officer, to call before them by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained,

(a) *Swaine v. Spencer*, 9 Dowl., 347.

(b) *Lewis v. Holding*, 2 M. & Gr., 875.

(c) *Burgh v. Scholfield*, 9 M. & W., 478.

(d) *Hammond v. Nairn*, 1 Dowl., N. S. 351.

and to make such rules and decisions as shall appear to be just according to the circumstances of the case ; and the costs of all such proceedings shall be in the discretion of the court."

Before this act was passed, there was no protection afforded to the sheriff in his proceedings upon an execution, where the goods seized or to be seized were claimed by adverse parties, although the court usually interfered and gave him time to return the writ of execution, until he was indemnified by either one party or the other, or the right between them was determined.(a) It will be observed that, by this clause no jurisdiction is given to a judge in chambers in the case of a sheriff, although by the first clause such jurisdiction is given in the other cases which come under the act : and a sheriff, therefore, cannot obtain any relief in vacation,(b) unless on a rule nisi, which has been made returnable in vacation by the court.(c) This was also the case under the Interpleader Act in England ; but by the 1 & 2 Vic., ch. 45, sec. 2, the defect was remedied, and relief can now be granted to a sheriff in vacation by any judge of the three superior courts at Westminster.

Cases within this section.—The sheriff before he makes any application to the court, should be careful in his inquiries as to the nature of the claim advanced by the adverse party ; as if the claim should turn out to be one clearly bad in law, or such as could not properly be treated as a conflicting claim, he would have to pay the costs of the application ; and in one case,(d) Taunton, J., said, " applications ought not to be considered as matters of course. It is the duty of the sheriff to make some inquiry before he comes to the court. He is not to be spared all trouble, and to abstain from making all inquiry. But where conflicting claims are advanced, on which he cannot decide, he may then come to the court." And where goods were taken in execution, and an adverse claim was

(a) Tidd, 9 Ed. 1017 ; Shaw v. Tunbridge, 2 W. Bl., 1064-1181 ; King v. Bridges, 1 Bing., 71 ; Beavan v. Dawson, 6 Bing., 566 ; George v. Birch, 4 Taunt. 585.

(b) Smith v. Wheeler, 3 Dowl., 431 ; Shaw v. Roberts, 2 Dowl., 25 ; Brackenbury v. Laurie, 3 Dowl., 180 ; Powell v. Lock, 4 N. & M. 352.

(c) Haines v. Disney, 2 Scott, 183 ; Bragg v. Hopkins, 2 Dowl., 151. Beames v. Cross, 4 Dowl., 122.

(d) Bishop v. Hinxman, 2 Dowl., 166.

set up under a bill of sale, which bore date *after* the levy, the court discharged the sheriff's application for relief, and made him pay the costs of the execution creditor.(a) The application for relief will not be entertained, if the sheriff has been guilty of any negligence, by which the plaintiff has been prejudiced.(b) And where upon a rule obtained under this statute, the execution creditor did not appear, and it was doubtful whether the sheriff who had acted under his express directions, had not misconducted himself subsequent to the seizure, the court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an action against the sheriff for misconduct provided that it should turn out that he had been guilty of any, and also if there had been any misconduct in the execution creditor in giving directions to the sheriff, that he might bring an action against him.(c) The sheriff will not be restrained from selling goods seized under a *fi. fa.*, on an offer of indemnity by a third party claiming the goods, which offer the sheriff had refused. In cases of this kind, the sheriff has a clear right either to accept the indemnity and rely for his protection upon that, or to apply to the court under the act.(d) The sheriff will be entitled to relief, although the claim set up, is merely that of lien,(e) but it seems to be doubtful, whether he can obtain relief, when the claim is merely of an equitable character.(f) When after a seizure under execution, two parties respectively made adverse claims, one of which claims was, and the other was not, sufficient, as not having been made strictly conformable to the words of the act; the sufficient claim was held to operate as a stay of proceedings, and the sheriff obtained relief.(g) And where goods had been taken by the sheriff under a *fi. fa.*, and sold by him, another *fi. fa.*, having in the meantime issued against the same goods, and a party claimed title to the property

(a) *In re Sheriff of Oxfordshire*, 6 Dowl., 136.

(b) *Brackenbury v. Laurie*, 3 Dowl., 180.

(c) *Lewis v. Jones*, 2 M. & W., 203.

(d) *Harrison v. Foster*, 4 Dowl., 558.

(e) *Ford v. Baynton*, 1 Dowl., 357.

(f) *Sturges v. Claud*, 1 Dowl., 505; *Roach et al. v. Wright*, 8 M. & W. 155; *Putney v. Tring et al.* 5 M. & W. 425.

(g) *Tarleton v. Dumelow*, 5 Bing., N. C. 110.

against both the defendant and the sheriff, and the two plaintiffs alleged that the goods had been sold improvidently and in the face of notice from the owner, the court made a special order for the relief of the sheriff. (a) The court will relieve the sheriff, even although the claimant is an infant. (b) And if an execution creditor abandons his process against certain goods seized under a *fi. fa.*, in favor of a claimant, and the sheriff still sells them under it, he may nevertheless apply to the court under the act. (c) Where a sheriff had seized goods in execution, and afterwards, while in possession, upon notice from a third party, that the goods belonged to him, having applied to the plaintiff for an indemnity, which was refused, thereupon sold the goods, and sought relief under the act; it was held, that the sheriff was entitled to protection, the fact of selling being of no consequence as far as he was concerned: for if he had a right to come to the court while the goods were in specie, he also had a right to come when he had sold them. And it was also said that the sheriff having sold certain goods which he thought belonged to the defendant, and finding that he could not obtain an indemnity from the plaintiff against the adverse claim, was compelled to come into court to protect himself. (d) Goods having been seized by the sheriff under a *fi. fa.*, were claimed adversely to the execution creditor; on an interpleader rule obtained by the sheriff, the claimant and the sheriff appeared, but not the execution creditor. The claimant supported his title by affidavit. The court refused to order generally, that the execution creditor should be barred of his demand, but made a rule that the sheriff should withdraw from the possession, and the execution creditor take no proceedings against him in respect of the goods non-claimed. (e) Where a seizure in execution by a sheriff is disputed, on the ground that the goods on which the levy has been made, were held by the defendant, not in his own right, but merely as executor in trust for others, the defendant is to be considered "as not being the party against

(a) *Slowman v. Back*, 3 B. & Ad., 103.

(b) *Claridge v. Collins*, 7 Dowl., 698.

(c) *Baynton v. Harvey*, 3 Dowl., 344.

(d) *Baynton v. Harvey*, 3 Dowl., 344.

(e) *Doble v. Cummins*, 7 Ad. & El., 580.

whom the process issued," and the sheriff may therefore apply for relief under this section. (a) Where another claimant appears after a rule has been obtained by the sheriff, an application may be made on behalf of the sheriff to have the new claimant included in the rule ; thus, in case of the bankruptcy of the claimant after the rule has been obtained, the sheriff may apply to have the assignees brought before the court in lieu of the original claimant. (b) The court has no power to dispose of the matter in dispute in a summary manner, without the consent of the parties who appear on the sheriff's rule. An issue must be directed (c) and this will be done although the goods, which must however have been *seized* by the sheriff, (d) are in the possession of another, and not of the defendant against whom execution has issued, for the act says nothing about the party who may be in possession of the goods. (e)

Cases not within sixth section.—The sheriff is not entitled to relief under this section, unless he has actually seized or is in possession of the goods claimed (f) but unless there has been a claim actually made, the mere fear of a claim will not be sufficient, as relief was refused, where it was only shewn that notice had been given to the sheriff that a docket had been struck, and that a fiat had afterwards issued against the defendant. (g) The claim must also be of such a description that it can be enforced by action (h) and the court refused to grant a rule to the sheriff, merely because a partner of the defendant had given notice to the sheriff to quit possession, on the ground that the goods seized were partnership property, and the defendant had no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects. The duty of the sheriff is to sell the share, though he may not be able to ascertain the amount of actual interest. But if in such a case the creditor disputes the partnership.

(a) *Fenwick v. Laycock*, 1 G. & D., 532 ; 2 Q. B., 108, S. C.

(b) *Kirk v. Clark*, 4 Dowl., 363.

(c) *Curlewis v. Pocock*, 5 Dowl., 381 ; *Bramidge v. Adshead*, 2 Dowl., 59.

(d) *Holton v. Guntrip*, 6 Dowl., 130 ; *Scott v. Lewis*, 2 Cr. M. & R. 289.

(e) *Allen v. Gibbon*, 2 Dowl., 292.

(f) *Holton v. Guntrip*, 6 Dowl., 160.

(g) *Tarleton v. Demelow*, 5 Bing. N. C. 510.

(h) *Isaac v. Spilsbury*, 2 Dowl., 211 ; and see 8 Dowl. 155, note.

the sheriff will be entitled to the benefit of the act.(a) Where it appeared that the undersheriff was in partnership with the solicitor of one of the claimants, the court refused to interfere.(b) So where the undersheriff was partner in business with the execution creditor, relief was refused.(c) So where it is a mere struggle between two execution creditors, each asserting a priority.(d) Nor is the sheriff entitled to relief, where he pays over the money levied to the execution creditor, after notice of a claim by a third party, unless upon application, he brings into court an amount equivalent to the sum which he has levied.(e) Relief will not be granted in an action for unliquidated damages, as the act does not extend to such actions.(f) Where a sheriff after levying the amount of an execution on the defendant's goods, paid over the proceeds to the execution creditor, not having received any notice of a claim from any one, and afterwards an action was brought against him by the assignees of the defendant to recover the value of the goods, the court refused to interfere; and the fact of the sheriff's offering to bring into court a similar amount to that levied, to abide any order the court may make, will not, it seems, make any difference.(g) So a sheriff who has delivered over to a claimant goods taken in execution, is not entitled to relief.(h) So where the sheriff on a claim being set up, withdraws without making any seizure.(i) And where an execution had been levied, and a claim was subsequently set up under a bill of sale dated *after* the levy, the court discharged the rule, with costs to be paid to the execution creditor.(j) The court will not grant a rule on behalf of a sheriff who has been served with notice of a claim to goods taken in execution, made by a party who claims a share in them, as one of the next of kin to a person deceased, to whom the defendant has taken out administration, and

(a) *Holmes v. Mentze*, 4 Ad. & El. 127.

(b) *Duddin v. Long*, 3 Dowl. 139.

(c) *Ostler v. Bower*, 4 Dowl. 605.

(d) *Day v. Waldeck*, 1 Dowl. 523.

(e) *Anderson v. Calloway*, 1 Dowl. 636.

(f) *Walter v. Nicholson*, 6 Dowl. 517.

(g) *Inland v. Bushell*, 5 Dowl. 147; *Scott et al. v. Lewis*, 4 Dowl. 259.

(h) *Kirk v. Almond*, 2 Law. Jour. N. S. Exch. 13.

(i) *Holton v. Guntrip*, 6 Dowl. 130.

(j) *In re Sheriff of Oxfordshire*, 6 Dowl. 136.

who had previously obtained an injunction in equity against the defendant's disposing of the property taken in execution. In such a case, where the execution creditor refuses to indemnify the sheriff from the consequence of a sale, the proper course for the latter to pursue is to apply to the court to enlarge the time for returning the writ.^(a) Where a fi. fa. was delivered to the sheriff two months before notice of a fiat having issued against the defendant, and no reason was assigned for the delay in the execution of the writ, the court refused to grant the sheriff relief.^(b) And where an attachment has been obtained against the sheriff for not returning the writ before he has made application under the act, the court will not grant him a rule, unless he pays the costs of the attachment;^(c) and the sheriff will not be relieved where he has seized goods which were under a distress for rent at the time of the seizure.^(d)

Time of Application.—The application should be made by the sheriff, within a reasonable time after receiving notice of the adverse claim;^(e) but the mere fear that a claim may be made, when none has actually been made, will not be sufficient to induce the court to interfere,^(f) Where goods were taken in execution by the sheriff under a writ returnable 11th January, and a claim being made to them, the sheriff was prevented from applying for relief under the act, by a rule obtained by the defendant in the action, for setting aside the proceedings for irregularity, which rule was not disposed of until the 23rd January, when it was discharged: the court, deciding that the sheriff was too late in applying for relief on 31st January, though he was in Suffolk at the time the defendant's rule was discharged, (and the affidavit was sworn on the 30th) said, "If the sheriff could not come at once to the court, but was delayed by the rule, it was his duty to have watched the rule, and have come within four days after it was discharged, as that would have enabled the other partes to

(a) Roach v. Wright, 8 M. & W. 155.

(b) Lashmar v. Claringbold, 1 H. & W. 87.

(c) Alemore v. Adeane, Hope v. Adeane, 3 Dowl. 498.

(d) Haythorn v. Bush, 2 Dowl. 641; Clark v. Lord, 2 Dowl. 227.

(e) Devereux v. John, 1 Dowl. 548; Cook v. Aden, 2 Dowl. 11; Dixon Ensell, 2 Dowl. 621; Barker v. Phipson, 3 Dowl. 590.

(f) Isaac v. Spilsbury, 2 Dowl. 211.

appear in the same term." It was also decided in this case, that when delay or any other circumstance is to be accounted for, the sheriff must make a special affidavit stating the facts, and no supplemental affidavit well be allowed.(a) In another case, the sheriff was relieved, although he did not come to the court until eleven days after the notice of claim.(b) And where the delay on the part of the sheriff arose in consequence of negotiations between the parties, that was held to be a sufficient excuse for the sheriff not having applied *instantly*.(c) And when goods were seized in execution on the 15th of August, and a notice of claim was given the next day; a second notice of claim was given on 30th October, on the part of another person: It was held, that an application by the sheriff was not too late on the 9th November, the second notice of claim being of such a special nature, that the sheriff was entitled to some time for inquiry into the circumstances.(d) And where there are special circumstances which account for the delay, the court will grant relief, even though the motion is not made promptly.(e) And where on a notice of motion to be made on the first day of Hilary Term, or as soon after as possible, served on the 12th December on a claimant, a rule was obtained on the second day of that term, and the officer who had obtained the rule did not attempt to serve it until the 25th January; on the hearing (when the claimant did not appear) the court held this to be delay and negligence, and on enlarging the rule by reason of insufficient service, directed the costs of the rule to be paid by the officer.(f)

Affidavits in support of, and Against the Motion.—The application should be supported by an affidavit, stating the seizure of the goods by the sheriff under the execution, that the goods or proceeds arising from their sale are in his hands, or the hands of some other party for him, and the notice of the claim by the party who made it,(g) and such other facts as may assist in inducing the court to grant the

(a) Cook v. Allen, 2 Dowl. 11; Ridgway v. Fisher, 3 Dowl. 567.

(b) Skipper v. Lane, 2 Dowl. 781.

(c) Dixon v. Ensell, 2 Dowl. 621.

(d) Toulmin v. Edwards, Will. Wool. & Dav. 579.

(e) Barker v. Phipson, 3 Dowl. 590.

(f) Lambert v. Townsend, 1 Law. Journal, N. S. Exch. 113.

(g) Northcote v. Beauchamp, 1 M. & Scott, 158.

application. As no supplemental affidavit will be allowed after the rule nisi is obtained, if there has been any delay, it should be accounted for in the first affidavit.(a) And although in the applications for relief made by individuals under the first section of the act, it is expressly required that the party applying should deny any collusion by affidavit, yet as the language of the sixth section, under which the sheriff comes for protection, is different in this respect, no such denial is required on an application by the sheriff,(b) nor is it necessary to state that any application has been made to the adverse claimants for an indemnity.(c) It is not required that an execution creditor appearing on the rule should produce an affidavit.(d) But the claimant must, if he appear to the rule, state the nature of his claim upon affidavit of the facts.(e) An affidavit in shewing cause may be sworn at any time before the cause is shewn.(f)

PROCEEDINGS ON THE INTERPLEADER RULE.

Who may Appear.—No one has a right to be heard against the rule obtained by the sheriff, unless he is called upon by it, although he is in fact a claimant: and if he is called upon in one character, he cannot appear in another.(g) Where however after the rule nisi had been obtained, the defendant became bankrupt, his assignees were admitted as parties to the rule.(h)

Practice on Hearing the Rule.—If there be any doubt, on the hearing of the motion, the court will not try the respective merits of the claimants, but will direct an issue to try them, or an action against the sheriff,(i) and sometimes the court will discharge the rule without directing either an issue or an action, and leave the sheriff to perform the duty cast upon

(a) Cook v. Allen, 2 Dowl. 11.

(b) Donniger v. Hinxman, 2 Dowl. 424; Dobbins v. Green, 2 Dowl. 509; Bond v. Woodhall, 4 Dowl. 351.

(c) Crossley v. Ebers, 1 H. & W. 216; Levy v. Champneys, 2 Dowl. 454.

(d) Angus v. Wotton, 3 M. & W. 310.

(e) Powell v. Lock, 3 Ad. & El. 315.

(f) Brame v. Hunt, 2 Dowl. 391.

(g) Clarke v. Lord, 2 Dowl. 55.

(h) Kirk v. Clarke, 4 Dowl. 363; see also Ibbotson v. Chandler, 9 Dowl. 250.

(i) Allen v. Gibbons, 2 Dowl. 292; Badcock v. Beauchamp, 8 Bing. 86; Slowman v. Back, 3 B. & Ad. 103.

him by law in the best manner he can ; and in which case, however, he will be entitled to a reasonable time to return the writ ;(a) or with the consent of the plaintiff and the claimant, the court will dispose of the merits of their claims, and determine the same in a summary way.(b) If the adverse claimant does not appear on the sheriff's rule, the court will bar it as against the sheriff, saving the rights of the claimant against the execution creditor.(c) and if the execution creditor does not appear, the court will bar his claim in respect of the subject matter brought in question on the rule, and the rule will be, not that the execution creditor should be barred of his claim generally, but that the sheriff shall withdraw from possession, and that the execution creditor take no proceedings against him, in respect of the goods claimed ;(d) and in one case, where the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequent to the seizure, the court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter ; the claimant to be at liberty to bring an action against the sheriff for misconduct, provided that it should turn out that he had been guilty of any ; and also, if there had been any misconduct in the execution creditor in giving directions to the sheriff, to bring an action against him.(e) Where neither the claimant nor the creditor appeared the court directed the sheriff to sell so much as would satisfy his poundage and expenses, and to abandon the rest.(f) If the sheriff has sold, and the execution creditor does not appear, the court will order the produce of the sale to be paid over to the claimant. And although the execution creditor abandons his process against the goods seized by the sheriff, in favor of the claimant, the sheriff may still shew in an action against himself, that the goods were the defendant's property.(g) When

(a) *Rex v. Sheriff of Hertfordshire*, 5 Dowl. 144.

(b) *Ford v. Baynton*, 1 Dowl. 357 ; *Curlewis v. Pocock*, 5 Dowl. 381.

(c) *Bowlder v. Smith*, 1 Dowl. 417 ; *Perkins v. Barton*, 2 Dowl. 108.

(d) *Doble v. Cummins*, 7 Ad. & El. 580 ; *Ford v. Dillon*, 5 B. & Ad. 885. But see *Donniger v. Hinxman*, 2 Dowl. 424.

(e) *Lewis v. Jones*, 3 M. & W. 203.

(f) *Everleigh v. Salisbury*, 3 Bing. N. C. 298, 5 Dowl. 569.

(g) *Baynton v. Harvey*, 3 Dowl. 344.

the landlord makes a claim for rent, and gives notice in proper time, the sheriff ought to pay him, or he may have to pay the costs of the landlord's appearing to his rule. (a) And if the sheriff under such circumstances, bring the landlord into court with other claimants, the court will order the rent to be paid to the landlord on his giving security, with costs; but the expense of such security will fall upon the sheriff.

(b) Service of a rule on the agent of the execution creditor is good service, and the court will not make any final order in the absence of the party, without an affidavit that he has been served with the rule; and it is doubtful whether a judge at chambers has authority to adjudicate under the sixth section, on an enlarged rule of court. (c) Two attempts to effect personal service of a rule to appear under the act, and a service on the wife of the claimant at his dwelling house, have been held not to be good service. (d) When the rule has been obtained, no delay should take place in acting upon it, as the courts watch narrowly the conduct of the applicants in this respect; and where there have been delay and negligence on the part of the parties seeking to be relieved, will compel them to pay any costs which may be thereby occasioned. (e)

Proceedings on the Issue.—In the feigned issue the claimant should be in general the plaintiff, and the execution creditor the defendant. (f) Where the court direct a feigned issue or action, they will order the proceedings against the sheriff to be stayed, until the trial of the feigned issue or action; and in the mean time give such directions respecting the sale of the goods, and application of the proceeds, or the value thereof, as shall appear to be just. (g) If the plaintiff neglect to take the issue down to trial, the course is to apply to have the money in court paid out to the other claimant; and in this case the affidavit should be entitled in the original cause. (h) And where the plaintiff in the issue, neglects to proceed to

(a) *Clark v. Lord*, 2 Dowl. 35.

(b) *Gethern v. Wilkes*, 2 Dowl. 189.

(c) *Phillips v. Spry*, 1 Law. Jour. N. S. Exch. 115; *Shaw v. Roberts*, 2 Dowl. 25.

(d) *Lambert v. Townsend*, 1 Law Jour. N. S. Exch. 113.

(e) *Ibid.*

(f) *Bramridge v. Adshead*, 2 Dowl. 59.

(g) *Tidd*, New Prac. 580.

(h) *Elliot v. Sparrow*, 1 H. & W. 370.

trial, the court will not allow the name of another claimant to be at once substituted, but will grant a rule nisi, to which the plaintiff originally appointed must be made a party, in order that he may have an opportunity of explaining the cause of his delay.(a) When instead of an order being made for an issue, the cause was referred with the consent of all parties, on certain terms, to a barrister, the court subsequently refused to grant a rule nisi for varying the order, by introducing a fresh term into the reference, rendered advisable in consequence of information, which one of the parties (an administratrix) had obtained since the hearing.(b) Where certain goods of one S. had been taken under a fi. fa., the assignee of S. (who had been declared a bankrupt) preferred a claim, whereupon an issue was directed, in which the assignees were plaintiffs and the execution creditors defendants, to try whether at the time of the seizure of the goods "the plaintiffs were entitled to the same, as against and free from the execution, or whether the goods were subject and liable to be so seized and levied under the same writ or not, as against the plaintiffs.": Held, that this put in issue the bankruptcy of S.(c) Goods seized under a fi. fa. issued by A. against B., are claimed by C. In a feigned issue between A. and C., to try whether the goods were at the time of the seizure the goods of C., it is competent to A. to negative the title of C., by shewing that the goods, though seized by A., and claimed by C., passed to the assignees of B. by relation to an act of bankruptcy committed by B. before the seizure, and before the conveyance under which C. claims.(d) On the trial of an issue under an interpleader rule, neither party will be allowed to set up a justertii, and in one case,(e) the court said, "an issue under the Interpleader act, is solely for the purpose of informing the conscience of the court; and the only question here which could be properly raised was, whether the trustees were entitled to the property; consequently evidence could not be received for the purpose of shewing a distinct right in a third party not before the court." An interpleader rule

(a) *Lydal v. Biddle*, 5 Dowl. 244.

(b) *Drake et al. v. Brown*, 2 C. M. & R. 270.

(c) *Lott v. Melville*, 3 Scott. N. R. 346.

(d) *Chase v. Goble*, 2 M. & G. 930.

(e) *Carne v. Brice, et al.*, 8 Dowl. 885.

may be acted on in a term after that in which it was granted and returnable, without being enlarged or continued.(a)

COSTS IN SHERIFF'S CASES.

Between Claimant and Execution Creditor.—The costs under the sixth section are in the discretion of the court, and where no great blame appears to attach to any of the parties, each party will have to pay his own costs attending the application.(b) Where an issue was directed under an interpleader rule between the claimant and the execution creditor, the costs of the issue to abide the order of the court, the claimant claimed the whole of the goods seized, but proved his right to part only: Held, that he was entitled, notwithstanding, to the general costs of the issue, as if he had been the plaintiff in trover, and also to the costs of the original and subsequent application to the court;(c) and where the party succeeds on the issue, he has a right to his costs of applying to take the proceeds of sale out of court, although he has not applied to the opposite side for a consent to take the money out.(d) The defendant being sued for rent in arrear, and having received notice from a mortgagee not to pay the rent to the plaintiff, obtained a rule for the mortgagee to interplead; the mortgagee having declined to appear to the rule, the court ordered each party to pay his own costs.(e) Where there was a seizure of the goods of a wrong person under a fi. fa., and an application for an interpleader rule was postponed at the request of the plaintiff and the sheriff, and then the execution was abandoned, the court held, that they had no power to grant the claimant his costs.(f) An interpleader issue was directed between A., the claimant, and B., the execution creditor, to try whether five horses, or one or some of them, were or was, when taken in execution, the property of A. The jury found, that two horses only belonged to A. A. obtained a rule nisi for payment to him

(a) *Levy v. Champneys*, 4 Ad. & El., 365.

(b) *Morland v. Chitty*, 1 Dowl., 520; *Clark v. Lord*, 2 Dowl., 55; *Oram v. Sheldon*, 3 Dowl., 640; *Dixon v. Ensell*, 2 Dowl., 621. *Contra Thompson v. Sheldon*, 3 Dowl. 640.

(c) *Staley v. Bedwell*, 2 P. & D. 309.

(d) *Meredith v. Rogers*, 7 Dowl. 596.

(e) *Murdock v. Taylor*, 6 Bing., N. C., 293.

(f) *Swaine v. Spencer*, 9 Dowl., 347.

of the general costs of the issue, the costs of the application under the Interpleader Act, and the costs of the rule. The court gave neither party the general costs of the issue, nor the costs of the trial, but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed A. his costs of the application under the act.(a) Where assignees set up a claim to goods taken in execution, and fail to sustain it, they must pay the costs of the issue directed to try the right.(b) If the execution creditor fails to appear upon the rule, he will have to pay the adverse claimant's costs, but not those of the sheriff;(c) and the claimant failing to appear, must pay costs, in like manner (d), and perhaps even the sheriff's costs;(e) but if the rule does not pray for costs, the order upon the claimant in such case to pay the costs, is only conditional, unless he shew cause within four days.(f) Where an issue is directed, the court may, after the trial, adjudicate upon the costs of appearing to the original rule and the issue; and on a rule for the revival of the original rule, will order payment of the costs of the latter and of the issue, and will do whatever else is right between the parties;(g) and when, after an issue directed, the claimant refused to proceed to trial, and abandoned his claim, it was held, that he must pay costs up to the time when he abandoned the issue, and also the costs of the application by the plaintiff to obtain out of court the money paid in by the sheriff,(h) and the costs of the sheriff from the time of directing the issue;(i) so if he neglect to pay money into court in pursuance of an order for that purpose, and this perhaps without a previous application having been made to him.(j) Generally when the issue has been tried, the unsuccessful party is liable, as of course, for the costs(h). Before making

(a) *Lewis v. Holding*, 2 M. & G., 875.

(b) *Melville v. Smark*, 3 Scott, N. B., 357.

(c) *Beswick v. Thomas*, 5 Dowl. 458.

(d) *Bowdler v. Smith*, 1 Dowl., 417; *Bryant v. Skey*, 1 Dowl., 428; *Contra*, *Glazier v. Cook*, 4 N. & M., 680.

(e) *Philby v. Skey*, 2 Dowl., 222; *Lewis v. Eicke*, 2 Dowl., 238.

(f) *Perkins v. Burton*, 2 Dowl., 108; *Shuttleworth v. Clarke*, 4 Dowl., 561.

(g) *Seaward v. Williams*, 1 Dowl., 528.

(h) *Wills v. Hopkins*, 3 Dowl., 346.

(i) *Scales v. Sargeson*, 4 Dowl., 231.

(j) *Ib.* 3 Dowl., 707; 4 Dowl., 231.

(k) *Bowen v. Bramridge*, 2 Dowl., 213; *Mathews v. Sims*, 4 Dowl., 234.

any application to the court for these costs, it seems that they should be first demanded of the opposite party, otherwise the costs of the application would not be allowed, if it were resisted only on the ground of such costs.(a) But the successful party is entitled to the costs of a rule for taking the money out of court, or for having the property in dispute delivered to him by the stakeholder, though he has not applied for the consent of the other party.(b) The affidavit in support of the application for costs, where the claimant relinquishes his claim, must be entitled in the names of the parties in the original cause.(c) Where money, the proceeds of an execution, has been paid into court by the sheriff, pursuant to a rule under the act, and the claimant abandons his claim, the application for paying the money out of court to the execution creditor is only nisi in the first instance.(d) The application by a successful party for costs may be made before judgment is actually signed; but the rule must be drawn up on condition of its being signed.(e)

When paid by sheriff.—Before the sheriff applies for an interpleader rule, he is bound to inquire into the nature of the claim set up; and therefore if he brings parties before the court in consequence of a claim, which is clearly bad in point of law, the court will compel him to pay the costs (f) and where they discharge his rule under other circumstances, they frequently order him to pay the costs.(g) And where rent was ordered to be paid to the landlord of certain premises who had been brought before the court by the sheriff, the sheriff was ordered to pay the expenses of such security; (h) and in the same case the landlord having claimed his rent, and given notice in proper time, the sheriff was ordered to pay also his costs of appearing, for it is the duty of the sheriff to inquire if rent is due, and if so to pay it.(i) If the sheriff

(a) *Bowen v. Bramridge*, 2 Dowl., 213; *Scales v. Sargeson*, 3 Dowl. 707

(b) *Meredith v. Rogers*, 7 Dowl., 596.

(c) *Elliot v. Sparrow*, 1 H. & W., 370.

(d) *Stanley v. Perry*, 4 Dowl., 599.

(e) *Bland v. Delano*, 6 Dowl. 293.

(f) *Bishop v. Hinxman*, 2 Dowl., 166.

(g) *Anderson v. Calloway*, 1 Dowl., 636; *In re Sheriff of Oxfordshire*, 6 Dowl., 136.

(h) *Clarke v. Lord*, 2 Dowl., 227.

(i) *Haythorn v. Bush*, 2 Dowl., 641.

have been guilty of negligence, he will be ordered to pay the costs of both parties.(a)

When Sheriff is, and is not, entitled to Costs and Expenses.-- The courts very early came to the resolution of not allowing the sheriff his costs of applying under the act, as it was considered that the act conferred a sufficient benefit upon him, by relieving him from a liability cast upon him by law;(b) and this rule has prevailed, even when the claimant, upon whose notice the sheriff acted, failed to appear to substantiate his claim.(c) But where the application was rendered necessary by gross misconduct on the part of the claimant, the sheriff was allowed his costs,(d) and where the court made the party claiming adversely, but who did not appear to support his claim, pay the costs of the execution creditor, but not of the sheriff, it allowed him the costs of a second appearance, when the adverse claimant afterwards applied to open the rule,(e) and unless there is one thing to shew that the consent of the parties is vexatious, the sheriff is not entitled to be paid his costs by the claimant of the goods, upon an arrangement being made between the parties.(f) But where a claim is made by one on behalf of another, for goods seized by the sheriff in execution, and upon the interpleader rule, neither party appears to shew cause, the plaintiff is not entitled to receive his costs from the sheriff; but the sheriff and the plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to shew cause.(g) And where the claimant abandoned his claim after an issue was directed, the sheriff was held to be entitled to his costs from the time of directing the issue, and of the application for those costs.(h) Where the claimant did not appear, but the rule did not call upon him to shew cause against the payment of costs, the court made the order only conditionally on his not appearing within

(a) *Beale v. Overton*, 5 Dowl., 599.

(b) *Barker v. Dynes*, 1 Dowl., 169; *Beswick v. Thomas*, 5 Dowl., 458; *Armitage v. Foster*, 1 H. & W., 208.

(c) *Oran v. Sheldon*, 3 Dowl., 610; *West v. Rotherham*, 2 Bing., N. C., 527; *Staley v. Bedwell*, 2 P. & D., 309.

(d) *Thompson v. Sheddon*, 1 Scott, 697.

(e) *Bowdler v. Smith*, 1 Dowl., 417; *Bryant v. Skey*, Id., 428.

(f) *Cox v. Fem*, 7 Dowl., 50.

(g) *Philby v. Skey*, 2 Dowl., 222.

(h) *Scales v. Sarge son*, 4 Dowl., 231.

a certain time.(a) A sheriff under a writ against the goods of A., had also seized the goods of B., and the question as to the title to the property was made the subject of an interpleader rule. The court held that the sheriff must have the costs of appearing in the first instance, but not those of a subsequent application for the distribution of the fund in court. A claimant under the Interpleader Act, who complains that some of his goods have been seized on an execution against a third party, is in the same situation as the plaintiff in trover, and must have his costs in the same way.(b) Where an execution creditor appeared on the rule, and consented with the claimant, that the sheriff should sell the goods, and that their produce should abide the event of an issue to be tried, but subsequently abandoned his claim, the court compelled him to pay the sheriff the cost of selling the goods;(c) where there had been great delay, however, on the part of the sheriff, in applying to the court in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claim, the court ordered each party to pay his own costs.(d) Where the sheriff has seized goods in execution, and the same are claimed, and he delivers up a portion of it to the claimant, he precludes himself from the protection of the act, and his application will under such circumstances be discharged with costs.(e) Where the interpleader rule was amended the sheriff was disallowed his costs,(f) and where an issue is directed, the court may adjudicate, after the trial, on the costs of the application by the sheriff, and of the issue.(g) Where reference had been made to the master to determine the question between the parties, the sheriff was allowed his costs of keeping possession of the goods, pending the reference.(h) But the court refused to allow the sheriff the costs of keeping possession, in consequence of a party refusing to consent to the decision of a judge at chambers, the act not authorizing

(a) *Shuttleworth v. Clark*, 4 Dowl., 561.

(b) *Staley v. Bedwell*, 10 Ad. & El. 145.

(c) *Dabbs v. Humphries*, 1 Bing. N. C. 412; *Underden v. Burgess*, 4 Dowl. 104.

(d) *Dixon v. Ensell*, 2 Dowl., 621.

(e) *Braine v. Hunt*, 2 Dowl., 391.

(f) *Gilliard v. Cave*, 8 Scott, 511.

(g) *Seaward v. Williams*, 1 Dowl., 528.

(h) *Underden v. Burgess*, 4 Dowl., 104.

a judge to interfere for the relief of the sheriff,(a) and the costs of keeping possession were also refused, where the execution creditor did not appear.(b) The court will order the sheriff to pay the proceeds of a sale of the goods seized into court, without allowing him to deduct his bondage.(c) His right to poundage will then depend upon the event of the issue,(d) and where neither the execution creditor nor the claimant appeared after the service of the rule, the court ordered so much of the goods to be sold as would satisfy the sheriff's poundage and expenses, and the rest to be abandoned;(e) and the court will allow the sheriff such expenses as he may incur as agent of the parties *after* his application,(f) and also the expenses of a sale effected under the authority of the court, for the benefit of all parties, though it appears on the trial of the issue, that the sale was wrongful.(g) A sheriff having taken goods in execution, which were claimed by a third party, obtained an interpleader rule. The parties appeared, and a rule was made that they should appear in the next term, and maintain or relinquish their claims, &c., and that in the mean time the sheriff should continue in possession till the further order of the court, and proceedings against him be stayed, and that a feigned issue should be tried between the claimants at the next assizes. The issue was tried, and the third party obtained a verdict against the execution creditor. The latter obtained a rule for a new trial, which after the lapse of five terms, was discharged. The sheriff had by direction of the execution creditor, quitted possession before the rule of a new trial. The interpleader rule had never been enlarged, or in any manner formerly continued. The court held, that they might nevertheless act upon the interpleader rule, for the purpose of awarding to the successful party his costs of appearing to the sheriff's rule, and costs of keeping possession of property incurred by such

(a) *Clarke v. Chetwoode*, 4 Dowl. 635.

(b) *Field v. Cope*, 1 Dowl. 567.

(c) *Bowdler v. Smith*, 1 Dowl. 417; *Beswick v. Thomas*, 5 Dowl. 458; *West v. Rotterham*, 2 Bing N. C., 527.

(d) *Barker v. Dines*, 1 Dowl. 169.

(e) *Everleigh v. Salsbury*, 3 Bing. N. C., 527.

(f) *Dodds v. Humphries*, 3 Dowl. 377.

(g) *Brown v. Delano*, 6 Dowl. 293.

party.(a) Where the sheriff has been allowed to withdraw from possession, he cannot, after he is out of office, be compelled to re-enter, whatever may be the result of the question between the parties.(b) Also even when the sheriff's rule is discharged, he is entitled to a reasonable time after the rule is disposed of, for making his return, and therefore an attachment issued against him on the day on which the rule was discharged, has been held irregular.(c)

Entering Proceedings, &c.:—

And be it enacted, That all rules, orders, matters and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause (if any) be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of taxation and amount thereof, given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by fieri facias or capias ad satisfaciendum adapted to the case, together with the costs of such entry and of the execution; and such writ and writs may bear the teste on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees and no more, as upon any similar writ grounded upon a judgment of the court: Provided always, nevertheless, that no such writ of capias ad satisfaciendum shall be sued out upon any such proceeding, except upon a similar affidavit to that required upon the ordinary judgment of such courts, respectively.

The court has no power, under this section, to order rules made under the act to be entered up otherwise than as appointed in this section, viz.—according to their true date.(d) The roll must be docketed, and carried into the treasury chamber in the same mannar as judgment rolls usually are. Where costs are given, the person who is to receive them must proceed, as in ordinary cases, to the taxation of the costs. After the taxation, notice in writing must be given of the amount of the costs allowed to the party ordering to pay the same, or his attorney or agent; and if the costs are not

(a) *Levy v. Champneys*, 4 Ad. & El. 365.

(b) *Milton v. Chambers*, 3 Dowl. 12.

(c) *Rex v. Sheriff of Hertfordshire*, 5 Dowl. 144.

Lambrith v. Barrington, 4 Dowl. 126; *Dickenson v. Eyre*, 7 Dowl. 721.

paid within fifteen days after such notice, a fi. fa. or ca. sa. might be issued for the same according to the act; but as the issuing of a ca. sa. is prohibited by 7 Vic., ch. 31, the remedy by fi. fa. is the only one that is open to the party in this country. The party entitled to costs may, in addition to the costs allowed, levy a reasonable sum for the costs of the fi. fa. The judgment, even after a verdict on a feigned issue under the act, must be entered up according to this section, and a judgment signed in the ordinary manner on such issue will be set aside on application to the court.(a) A party entitled to costs under an interpleader order is not bound to take out execution under the Interpleader Act, but may make the order a rule of court, and take out execution under 1 & 2 Vic., ch. 110, s. 18, of which the provincial statute, 7 Vic., ch. 31, s. 9,(b) is a transcript.

CASES IN THE ENGLISH COURTS.

THE ATTORNEY-GENERAL V. RAY and Others.

11 M. & W. 464.

A rule, on the part of the Attorney-General, to amend an information at the suit of the Crown, is absolute in the first instance.

THIS was an information filed at the suit of the Attorney-General, for the breach of a covenant to repair certain premises held under the crown.

The *Attorney-General*, on the preceding day (May 5), applied for leave to amend the information; and, upon stating that notice had been given to the defendants of the intended application, he obtained a rule calling upon them to shew cause peremptorily on this day, why the amendment should not be made.

Swan now appeared to shew cause against the rule; but—

PARKE, B. said—We have looked into the books, and we find from the authorities that the *Attorney General* is entitled to have this amendment made without a rule to shew cause.

(a) *Dickenson v. Eyre*, 7 Dowl., 721.

(b) *Cetti v. Bartlett*, 1 Dowl., N. S. 928.

The Court will now, therefore, grant a rule absolute in the first instance, on payment of costs, in order that the granting of a rule to shew cause in this instance may not be drawn into a precedent.

Rule absolute accordingly.(a)

MACDONALD v. MACLAREN.

11 M. & W. 465.

Practice as to service of a rule for leave to issue scire facias to revive an old judgment.

MONTAGUE SMITH moved for leave to issue a scire facias to revive a judgment more than fifteen years old. The judgment had been entered up on a warrant of attorney, in Michaelmas Term 1821, and in 1823 two years' interest was paid. It appeared from the affidavits, that, in the year 1828, the defendant went to reside in America; but a letter from him, dated 17th October, 1842, was said to have been received by a person in Ireland on the 18th of November following. The defendant was the owner of some houses in Liverpool.

PER CURIAM.—The proper course under the circumstances is to grant a rule to shew cause for next term: notice of the rule to be stuck up in the office, and to be served on the defendant's tenants in Liverpool.

Rule accordingly.

SMITH v. Cox.

11 M. & W., 475.

In assumpsit by the indorsee against the drawer of a bill of exchange, it is necessary to allege a promise to pay, and without such allegation, the count is bad on special demurrer.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange. The declaration stated, that whereas the defendant, on the 28th of August 1842, made his bill of exchange in writing, and delivered the same to one W. Silk, Jun., and thereby required the said W. Silk, Jun., to pay to the order of the defendant £20, three months after the date thereof,

(a) See *Att-Gen. v. Smith*, 5 M. & W. 372.

which period had elapsed before the commencement of the suit; and the defendant then delivered the said bill to the said W. Silk, and the said W. Silk then accepted the said bill, and the defendant then endorsed the same to one Justinian Adcock, who then endorsed the same to the plaintiff; and W. Silk did not pay the said bill, although the same was duly presented to him on the day on which it became due, of which the defendant then had due notice. There was also a count on an account stated.

Special demurrer to the first count, assigning the following causes:—That the said first count does not state, allege or contain any promise by the defendant to pay the said bill of exchange, or any promise by the defendant to pay the sum of money in that count mentioned; and that it is not in or by the said count stated or shewn, that the defendant promised to pay the said sum of money in the said count mentioned.

Whitehurst, in support of the demurrer, was stopped by the court, who called upon

Hugh Hill to support the declaration. It was not necessary to allege an express promise, as the law will imply a promise to pay from the facts stated: and the promise being only a conclusion of law, it could not be traversed. In *Griffith v. Roxburgh* (a), *Alderson*, B., seemed to be of opinion, though the point was not there determined, that since the new rules have rendered the plea of non assumpsit inadmissible in actions on bills of exchange, it is unnecessary to allege a promise to pay, which is not competent to the defendant to deny. It might be otherwise in an action at the suit of an executor, for in that case the promise may be put in issue—*Timmis v. Platt* (b). It is not necessary to allege matters of law, which the court are bound to take notice of. Although it is usual to state a promise in indebitatus assumpsit, it is not necessary to do so, it being a conclusion of law.

PER CURIAM (c).—Unless a promise be alleged in declarations on bills of exchange, there will be nothing to distinguish the action of assumpsit from that of debt, and from aught that

(a) 2 M. W. 723.

(b) Id. 720.

(c) Lord Abinger, C. B., Parke, B., Alderson, B., and Gurney, B.

appears here, there being no promise alleged, there might be a misjoinder of counts on the record. It was not the intention of the new rules to fritter away all distinction between the different forms of action. The plaintiff may have liberty to amend, otherwise there will be judgment for the defendant.

Leave to amend accordingly.

NICHOLSON and Others v. DYSON.

11 M. & W. 545.

When a defendant pleads the general issue, and several special pleas which are involved in the general issue, and the defendant succeeds on the general issue, but the special pleas are found for the plaintiff, the general issue is to be construed distributively for the purpose of taxation of costs; and the defendant is not allowed the costs on so much of the general issue as is involved in the special pleas found for the plaintiff, but such last mentioned costs are to be allowed to the plaintiff.

CASE,—The declaration contained two counts, charging the defendant with negligence as the attorney of the bankrupt, before his bankruptcy, in respect of two contracts made by the bankrupt for the purchase of certain leasehold premises, and in preparing and completing the conveyances thereof. The declaration alleged that the defendant had accepted a defective title, setting out the defects of title specially. The defendant pleaded not guilty to the whole declaration, and also a plea denying the bankruptcy. He further pleaded eleven pleas to the first count of the declaration, the last thereof being a plea of the Statute of Limitations, and ten pleas to the second count of the declaration. Several of the pleas were traverses of the specific defects of title alleged in the declaration, and one of the pleas to each count alleged that the defendant, before the completion of the purchase, fully explained the defects of the title to the bankrupt,

At the trial, a verdict was taken for the plaintiffs, subject to a reference, in the usual terms as to costs. By his award, the arbitrator directed the verdict to be entered for the defendant on the issue joined on the plea of not guilty, and also on the issue joined on the replication to the plea of the Statute of Limitations pleaded to the first count; and on the remaining twenty-two issues he directed the verdict to be

entered for the plaintiffs. On the taxation of costs, the Master refused to allow to the defendants the costs of any of his witnesses but one, on the ground that they were witnesses to those facts only which were put in issue by the several pleas which were found for the plaintiffs.

Kelly had obtained a rule calling on the plaintiffs to shew cause why the Master should not review his taxation, on the ground that the matters put in issue by the special pleas were in fact also put in issue by the plea of not guilty; and also that the Master was mistaken in determining that the evidence of some of the witnesses was applicable solely to the issues found for the plaintiffs.

Thesiger and *Hugh Hill* shewed cause.—The difficulty in this case is occasioned by the form of the pleadings, the defendant having pleaded so many pleas which were in reality but so many parts of the general issue. The general rule is well settled; (a) the question is only as to its application in the present instance. If the defendant had not pleaded the special pleas, there could be no doubt that the defendant would have been entitled to the costs of all the witnesses called to speak to any fact put in issue by the plea of not guilty, because he would have been the successful party on that plea. The fallacy lies in supposing that he had succeeded on that plea to its full extent, for he has not succeeded on such parts thereof as are involved in the special pleas. The issue raised by the plea of not guilty must therefore be construed distributively; on those parts contained in the special pleas the plaintiffs have succeeded, and on the residue only has the defence been successful; therefore the defendant is entitled only to the costs relating to such residue. *Daniels v. Barry* (b) is in point. There, in case for a deceitful representation upon the sale of a ship, in falsely representing her to be fit, whereas she was not fit, as the defendant well knew, the defendants pleaded, first, not guilty: secondly, a traverse of the allegation in the declaration as to unfitness: the jury found that the vessel was unfit, but that the defendants did not know it to be so:

(a) See *Knight v. Woore*, 3 Bing. N. C. 534; 4 Scott, 360; *Crowther v. Elwell*, 4 M. & W. 71; *Hazlewood v. Back*, 9 M. & W. 1.

(b) Law Journ. Rep. (N. S.) vol. 12, Q. B. 113.

and the verdict was entered for the defendants on the first issue, and for the plaintiffs on the second; and it was held that the Master was right in allowing to the plaintiffs the costs of their witnesses upon the issue as to the unfitness, and refusing to allow the defendants the costs of their witnesses called to prove their fitness, as they had raised a distinct issue as to the fitness of the vessel, though that would have been involved under the general issue. And the same principle is sanctioned by *Doe v. Errington*,^(a) *Prudhomme v. Fraser*,^(b) and *Routledge v. Abbott*.^(c) With respect to the other ground, the Master is the proper person to determine the fact as to what issues the witnesses were called to prove. [Alderson, B.—We have spoken to the Master, and he has informed us that he apprehends he was misinformed by the parties who attended the taxation, as to the particular facts which the witnesses were called to speak to.]

Kelly, contra, was not called on.

PARKE, B.—It would be more satisfactory, in consequence of what the master has stated to us, that this taxation should be reviewed. The Master is to allow costs to the defendant on so much of the general issue as the witnesses on his part were called to prove, and on which he succeeded, but he is not to allow to the defendants the costs of so much of the general issue as is involved in the special pleas found for the plaintiffs. The last-mentioned costs are to be allowed to them.

ALDERSON, B.—The rule is this. With respect to the costs of the witnesses, which are applicable solely to issues found for the plaintiffs, they are entitled to costs; were such costs applicable to issues on which the defendant has succeeded, he is entitled to costs. Upon so much of the general issue as is contained in the special pleas, the defendant has failed, and the plaintiffs have succeeded, therefore the defendant is not entitled to the costs relating thereto. The Master should treat the general issue as distributive.

ROLFE, B., concurred.

Rule absolute.

(a) 4 Dowl. P. C. 602. (b) 2 Ad. & Ell. 645; 4 Nev. & M. 512.

(d) 8 Ad. & Ell. 592; 3 Nev. & P. 560.

THE UPPER CANADA JURIST.

REPORTS IN CHANCERY:—JAN. 1839.

EWING *v.* GOOD and the ATTORNEY-GENERAL.

GOVERNMENT CONTRACTS FOR SALE OF LANDS—TIME OF THE ESSENCE OF THE CONTRACT.—The bill in this case stated, that the plaintiff and his brother, John Ewing, on the 25th of August, 1835, bid off, at the government sale by auction of the Indian lands at Brantford the north half of Lot No. 26, in the 2nd concession of the township of Brantford, one hundred acres; that by the first article of the conditions of sale it was provided the purchaser should, within a week from the day of sale, pay a deposit (a quarter of the purchase money), and the residue should be paid by certain instalments, as thereby provided for; that the price or sum for which the said half lot was bid off was £100, and that a memorandum thereof was duly signed by the parties; that the plaintiff attended at the office of the Commissioner of Crown Lands, at the time appointed, to make the first payment on the lot in question, as well as upon other lots he had purchased at the same sale, but after making the payments for the other lands, he found he had not sufficient money left to pay the quarter of the purchase-money of the lot in question, whereupon he asked a clerk in the said office whether it made any difference if he did not then pay the amount, to which the clerk replied, that it would make no difference, and would do as well if paid at the next sale; that John Ewing has assigned his interest in the lot in question to the plaintiff; that in the month of April, 1837, a notice was publicly given in the newspapers, on the part of the government, that all defaulters for land purchased at the government sales should pay on or before the 10th of May, 1837; that, in pursuance of this notice, the plaintiff went to the office of the Commissioner of Crown Lands, before the

time specified, and offered and tendered to pay the amount of the deposit upon the lot in question, but the same was refused. The bill then stated that the defendant Good afterwards bought the lot from the government at an advanced price, and that a patent was issued to him, and that Good knew before he purchased, that the plaintiff was entitled to the same. The bill then prayed that the patent issued to Good might be repealed, or that Good might be decreed to surrender the lot to Her Majesty; or that, under the circumstances, it might be decreed that Good was a trustee for the plaintiff, and that he should convey the lot to the plaintiff, upon the plaintiff's specifically performing the contract.

The defendant Good by his answer stated that he did not know anything of any sale to the plaintiff; that he only arrived in this country from England in August, 1837, and found the lot in question vacant and open for sale, and on the 25th of October, 1837, he contracted with the acting trustee for the Indian department for the purchase of the same, at the price of £125, which sum the defendant paid, and thereupon obtained the patent from the government of the same. The defendant admitted that he did converse with the plaintiff respecting the lot before he purchased, and he found that there had been some dispute between the plaintiff and one Hamblin respecting the lot, but upon further inquiry the defendant was informed that the lot was open for sale, and he therefore purchased it.

On the part of the plaintiff the sale of the lands was proved, and the minute-book, signed by the plaintiff, containing the conditions of the sale, was produced. The assignment of John Ewing was proved. It was also proved, that after the sale, in 1835, the plaintiff paid, at the office of the Commissioner of Crown Lands, the instalments on some other lands, and asked whether it made any difference whether he then paid the instalment on the lot in question. And the clerk who received the money said he thought not, and thought it might remain until the next sale. The plaintiff was aware at the time, that the clerk had not, and did not appear to have, any authority to give time, but the clerk only expressed his opinion. The government was more particular

about the payment of the first instalment than about others. The notice to defaulters to pay was proved, and also that plaintiff went on the 10th of May, 1837, and offered to the Commissioner of Crown Lands to pay the first instalment, which was refused. It was also proved, that in August or September, 1837, two conversations took place between the defendant Good and the plaintiff respecting the lot in question. In the first, the plaintiff told Good that he had purchased the lot at a sale, but had not paid the instalments, and Good offered him \$900, if plaintiff would procure him (Good) a deed of it. The second conversation was a few days after this, and then the claim of Hamblin to the lot was alluded to, who it was said had attempted to purchase it at private sale; and plaintiff remarked, that if any one should so purchase it, he would bring a suit in Chancery for the lot. It was further proved, that on the 22th of October, 1837, when Good went to the trustee of the Indian department to purchase the lot, he spoke of the dispute between Hamblin and the plaintiff, and that the matter had been before the executive council, and that the claims of both parties had been disallowed by the council, and that the lot was open for sale. It was proved that Hamblin had at one time made some improvements upon the lot, and that it was claimed by him. On the part of the defendant it was proved, that the conversations between the plaintiff and defendant were rather an allusion to the disputes between the plaintiff and Hamblin respecting the lot, and that Good, supposing these disputes were still existing, said he would give such sum for the lot; that the plaintiff was aware, when Good offered to pay something to procure a title to the lot, that the difficulty in the way of the plaintiff obtaining the same, and the reason why the instalment could not be received was, that both the plaintiff and Hamblin, claimed the lot. It was further proved, that the plaintiff and Hamblin had laid their respective claims before the executive council, and both had been disallowed: that of Hamblin, because he had no claim to it; and of the plaintiff, because he had forfeited any claim he had by non-payment of the instalments. The plaintiff was aware of the order of council; he told the defendant the purport of it.

The contents of the certificate, and the conditions of sale expressed in the sales book, were in these words:—"And it is understood, that this certificate shall be void, unless transmitted to the Commissioner for Crown Lands at Toronto, together with the amount of the first instalment, being £25, on or before the 2nd of September next, and the land shall be liable to be resold at any future sales. On production of this certificate, and payment of the first instalment, the Commissioner for Crown Lands will give to the purchaser a written acknowledgment of the payment on account, and authority to take possession of the lot; but the obtaining a perfect title must of course depend on the punctual fulfilment of the conditions of the purchase."

It was further proved that the invariable rule in the land office was, to declare the lot open for sale, if the instalment was not paid on the day appointed, though formerly the office was less strict. The commissioner never considers the certificate of the auctioneer a contract of sale, or that any contract is entered into until payment of the first instalment.

Mr. Baldwin and *Mr. Esten* for the plaintiff.

1. That time was not of the essence of the contract. Contracts for the purchase of the Crown lands stand upon the same footing as the contracts of individuals, and that in this case there was a clear offer to perform on the part of the plaintiff proved; and as the plaintiff might be decreed to pay the purchase money with the interest, there could no damage accrue. Interest might be given as compensation for non-payment of the money at the day, but the plaintiff was entitled to consider the land as his, and had therefore a right to have the contract for a conveyance performed.

2. But supposing the commissioner had a right to make the payment of the first instalment a condition precedent to its being considered a contract of a purchase, in this case the payment was waived by the clerk in the office. The clerk had sufficient authority to do so, and from what he said the plaintiff rested content that his money would be received at some other time.

3. That the notice given on the part of the Government, to all persons to pay by a particular day, expressly extended to

the plaintiff, and he was entitled to the benefit of that notice. The notice was general in its terms, and must therefore be taken to apply to all persons. The plaintiff so understood it, and had offered to comply with its terms.

4. The defendant was not an innocent purchaser ; he had notice of the plaintiff's claim to the lot, and bought with this knowledge. It was impossible for him to urge that he was a purchaser without notice.

Cases cited.—*Williams v. Thompson*, Newl. on Contracts 238 ; *Gregson v. Riddle*, 7 Ves. 258 ; *Gibson v. Patterson*, 1 Atk. 12 ; *Seton v. Slade*, 7 Ves. 265 ; *Weymouth v. Boyer*, 1 Ves. J. 437 ; *Story v. Lord Windsor*, 2 Atk. 230.

The Attorney General and Mr. Burns, for the defendants.—Time was in this case, being a contract with the crown, to be considered of the essence of the contract ; and if such a rule did not prevail in respect of contracts concerning the crown lands, it would lead to great confusion and uncertainty. Where time was not essential between parties, and the parties so considered it themselves, the court would not make it of the essence of the contract ; but where the intention of the parties was that time should be material in the performance, the court would act according to the intention. The old doctrine that in no case could the parties make agreements which would bind the court to any particular line of decision, has of late years been modified, and adapted to the changes constantly taking place in the business transactions of life. See *Lloyd v. Collett* ; 4 Bro. C. C. 449, in which *Gregson v. Riddle* is reviewed ; 3 Mad. 440 ; 1 Jac. & Walk. 419 ; 1 Russ. 376.

The evidence shews that the Commissioner of Crown Lands was particular about having the first instalment paid. It is a notorious matter, that new lands in the country are every year becoming more valuable, and it could never be intended that the Crown should be bound to wait the convenience of parties making payments taking the chance of an increase in value, thereby determined whether the party would or not fulfil the contract. The plaintiff had been guilty of laches, and therefore was not to be favored.—3 Ves. 686 ; 13 Ves. 225. No time was given to the plaintiff, by any authorised

person, and the notice in the paper did not apply to the plaintiff's case; but was intended to apply to persons who had partly performed a bona fide contract, and had become in arrear in payments. There appears nothing inequitable in the conduct of the defendant Good; on his arrival in the country he found the lot in question claimed by two parties, and upon further inquiry he found that the claims of both had been disposed of by the Council, and that the Crown had thrown open the lot for sale.

THE VICE-CHANCELLOR.—The facts set forth in the bill do not appear to be disputed. The defence rests on the ground that the plaintiff had never complied with the conditions of sale, and therefore there was no subsisting contract. It did not appear to him that it was necessary to pay the instalment of the purchase money before it could be considered a subsisting contract; in that he could not agree with the views of the Commissioner of Crown Lands, because the payment of the money might be waived. The question, in this case, was whether any equitable right appeared to be existing in the plaintiff.

To decide this point the first question was, whether time was, in this case, of the essence of the contract. The old cases certainly went far to establish the point, that in no case could the parties themselves be bound so as to control the decision of the Court; but the late cases were, that time, like any other part of the contract, will be construed strictly. Sir E. Sugden considered that the case of *Hodson v. Bertram*, 3 Mad. 440, had settled the law on that point, and refers to a later decision of *Williams v. Edwards*, 2. Sim. 78. The conditions of sale are as forcible as they well can be, and all the conditions must be looked at, because the whole form but one contract. It appeared that the intention of the Commissioner was, to make time the essence of the contract in all the government sales, and more particularly the sales of the Indian Lands. The great object of the Government was to have the Crown Lands settled, and not to remain waste, and therefore compelling the purchasers to be punctual would be an inducement to those only who intended to settle to become purchasers. The Government, however, were not entitled to any further con-

sideration in this respect than individuals; there was no difference in the construing of contracts, between those made with the Government and those with subjects. The plaintiff contended that he was entitled to the benefit of the notice published in the newspaper; without considering what construction either the plaintiff or the officer in the Crown Lands Office put upon the notice, the simple question was, whether such a notice could revive an equity which had previously been extinguished? What effect such a notice might have had if applicable to an individual case exclusively, he would not say, but in the present, it was too general to apply to the plaintiff, and he thought clearly applied only to those cases in which the equity of the parties was not extinguished. The intention of the Crown was rather the settlement of the lands than to obtain the purchase money, for a long time was given for payment, and this constituted the difference between Government and individual contracts. The evidence of Mr. Thornhill was relied upon by the plaintiff, to show that he had an extended time of payment given him, but it could never have been meant that such an extended time as contended for was given. The custom then was to sell monthly, and therefore a short time only would elapse before the payment should be made. It was wrong however to have said anything about it, but it did not appear that the plaintiff was misled thereby, for it was the duty of all persons seeking to enforce contracts, not only to be willing, but also to be ready to perform. It appeared that the plaintiff was willing, but he thought that stronger evidence of readiness was required than had been offered for the consideration of the Court. A man of common prudence would not have acted as Ewing had done: he would have shewn more alacrity if he really wished to become the owner of the land for the purpose of selling again.

It was unnecessary to advert to any other points, for in his opinion the plaintiff had not established his case, but he would say that he could not perceive that he had any equity against the defendant Good. Mr. Good had come to this country long after the disputes had ended respecting this lot, and finding it open to purchasers, bought it, and obtained the patent.

The bill was therefore dismissed, but as the plaintiff might have acted in consequence of the notice, and what was told him respecting the payment of the instalment, it was dismissed without cost.

TARIFF OF COSTS FOR COURTS OF BANKRUPTCY.

Whereas it is provided by the Statute 7 Vic. ch. 10. sec. 68, that the Court of Chancery in and for that part of this Province formerly Upper Canada, shall and may regulate the costs to be allowed in all cases and matters of Bankruptcy not otherwise provided for by the said Statute; I, the Honorable Robert Sympson Jameson, Vice-Chancellor of Upper Canada, exercising the judicial powers of the said Court, do *Order*, that the fees hereinafter expressed shall and may be taken and allowed to be taken, by any Commissioner or Judge of the Courts of Bankruptcy in that part of this Province formerly Upper Canada, Solicitor, Attorney, Clerk or Sheriff, or other officer, for the services respectively rendered by them.

(Signed,) ROBERT S. JAMESON, V. C.

FEEES TO SOLICITOR OR ATTORNEY.

	£	s.	d.
Attending and taking instructions to procure a commission, or to summon a debtor, or to oppose a summons, including attending witness and to search for prior commission.....	0	7	6
Drawing affidavit of debt to procure a commission or a summons, and all other affidavits as to acts of bankruptcy or of the trading, and all other papers and documents, per folio.....	0	1	0
Fair copy thereof, per folio.....	0	0	6
Other copies thereof, when required or necessary.	0	0	6
Drawing and engrossing petition for commission.	0	5	0
Attending the judge or commissioner with the affidavits and petition to bespeak the commission.	0	5	0
Attending upon proving debt, and every special attendance upon meetings for the choice of assignees, and all other special attendances.....	0	5	0
Every notice, including copy and service.....	0	3	6
Fee on every warrant of attachment or special writ granted by the judge or commissioner.....	0	5	0
For preparing and engrossing bond on debtor being summoned, and attending execution.....	0	10	0

For preparing and engrossing every bond of arbitration, and attending execution	0	10	0
For drawing every admission of debt (per Stat.)..	0	1	3
All common affidavits of services of papers, including the attendance	0	2	6
All common attendances.....	0	1	3
Writing general letters, each.....	0	2	6
For every bill of costs, and attending taxation of same	0	5	0

ON PETITION OR MOTION IN THE COURT OF REVIEW.

Attending and taking instructions for petition or motion.....	0	5	0
No instructions to oppose a petition or motion allowed.			
Drawing notice of motion, per folio.....	0	1	0
Fair copy to serve, per folio	0	0	6
Drawing special or common petition, per folio.....	0	1	0
No fee allowed to counsel for settling, unless in very special cases.			
Copy of petition to present, per folio.....	0	0	6
Attending and reading over, and attesting each signature	0	5	0
Attending to present and to procure an appointment to hear.....	0	2	6
Copy of petition to serve, per folio.....	0	0	6
Service of the petition or notice of motion	0	2	6
Instructions for affidavit in support of the petition.	0	5	0
Drawing and engrossing affidavit, per folio.....	0	1	0
Copy thereof when required or necessary, per folio.	0	0	6
Brief of petition and of affidavits for counsel, per folio	0	0	6
Observations thereon.....	0	5	0
Fees to counsel.....			
Attending court when petition or motion heard...	0	5	0
Attending upon and settling minutes of order.....	0	5	0

COSTS OF THE DAY.

If one counsel only is instructed, then to each solicitor's client.....	2	0	0
If two counsel, then to each	4	0	0

ABANDONED NOTICE.

Costs of notice of motion abandoned.....	2	0	0
If the party to whom such costs are to be paid may have incurred further costs, the Court of Review to be at liberty to order the payment thereof.			

FEES TO THE JUDGE OR COMMISSIONER.

For every commission (per Statute).....	2	0	0
Filing every affidavit or other paper.....	0	0	4
For every summons issued, or appointment.....	0	1	3
Swearing affidavits, or administering oaths.....	0	1	0
Taking examinations <i>viva voce</i> , per folio.....	0	1	0
Copies thereof when required or necessary, per fol.	0	0	6
Copies of all proceedings when required or necessary, per folio	0	0	6
Certificate of state of proceedings or correctness of the minutes of proceedings before the judge or commissioner when required, and all other usual certificates.....	0	2	6
Taxing costs.....	0	2	6
For every sitting under the commission, but if more than one on the same day, then the same to be apportioned (per Statute).....	0	10	0
For every warrant of attachment for disobedience of order or summons, every execution for costs, and all other special writs or warrants.....	0	5	0
For every instrument appointing assignees, executed in duplicate.....	0	10	0
For approving of bond with sureties.....	0	5	0
For every bankrupt's certificate.....	0	10	0
For every special attendance not otherwise provided for	0	5	0
For making exhibits produced, each.....	0	1	0

CLERK TO COMMISSIONERS.

For filing every paper or document.....	0	0	4
For every sitting under the commission, per day, to be apportioned, if more than one, on the same day (per Statute).....	0	10	0
For copies of all papers when required or necessary, per folio	0	0	6
Fee for keeping record of proceedings in each case.	0	5	0
For any list of debts proved at first meeting.....	0	2	6
For every list of debts proved if made at the second meeting	0	2	6

SHERIFF.

For seizure of estate and effects under the commission.....	0	10	0
For advertisements, each paper.....	0	2	6
Actual disbursements for advertising.....	<hr/>		
Actual disbursements for taking charge of the estate until delivered to the assignees, to be subject to the discretion of the judge or commissioner.....	<hr/>		

For taking an inventory of the estate	0	10	0
If the same exceeds ten folios, extra per folio.....	0	1	0
Copy thereof to be handed over to the assignees, per folio.....	0	0	6
Service of summons on bankrupt, or other sum- mons required by the judge or commissioner to be served.....	0	2	6
Mileage in all cases per mile distance from the court house	0	0	6
Executing every warrant of attachment.....	0	5	0
Poundage and fees upon executions for costs the same as levied and allowed on the like execu- tions from the Court of Queen's Bench.....	<hr/>		
N.B.—The folio to consist in all cases of one hundred words.			

CASES IN THE ENGLISH COURTS.

HILL v. SMITH.

Jurist, 8, 179.

A party before his bankruptcy paid into the hands of a banking company the sum of 440*l.*, to be applied in discharge of three respective bills of exchange; but being indebted to the company to a larger amount, they, instead of performing their contract, put the money to his account. One of the bills was consequently dishonoured, and the other two remained in the hands of the holders until the bankruptcy. The assignees having declared specially against the banking company—held, that they were entitled to recover the full amount of the money paid into the hands of the Defendants; as the true measure of damages was the amount which the bankrupt himself might have recovered if he had not become bankrupt, and not the ultimate loss to the bankrupt's estate according to the proofs upon it.

This case was argued on the 4th February, by

Baines and *Ellis* for the defendants, and *Cowling* for the plaintiffs, before Parke, Alderson, Gurney, and Rolfe, BB. The nature of the question fully appears from the judgment of the court, and it will be sufficient to add, that the following authorities were referred to in the course the of argument:—*Marzetti v. Williams*, 1 B. & Adol. 415; *Wright v. Fairfield*, 2 B. & Adol. 727; *Hancock v. Caffin*, 8 Bing. 366; *Porter v. Vorley*, 9 Bing. 93; *Brewer v. Dew*, 11 Mee. & W. 625; 7 Jur. 953; *Spence v. Rogers*, 11 Mee. & W. 191; *Howard v. Crowther*, 8 Mee. & W. 601; 5 Jur. 914; *Buchanan v. Findlay*, 9 B. & C. 738; *Thorpe v. Thorpe*, 3 B. & Adol. 580; *Colson v. Welsh*, 1 Esp. 378; *Kearsey v. Carstairs*, 2 B. & Adol. 716; *Drake v. Beckham*, 11 Mee. & W. 315: 7 Jur. 204.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B.—This case was argued before us a few days ago, during the sittings after term, cause being shewn against a rule to increase the damages from 54*l.* 15*s.* 6*d.* to 400*l.*, pursuant to leave reserved by my brother Anderson, before whom the case was tried. The plaintiffs are assignees of Knapton & Co., bankrupts, and have brought this action on a special promise by the defendants, who are the Bradford Banking Company, to the bankrupts, in consideration of 440*l.* paid by them to the defendants, to pay with part of it an acceptance of the bankrupts for 54*l.* 15*s.* 6*d.*, made payable at Williams & Co.'s, the defendants' London bankers, and with the residue to pay two bills of the bankrupts in favor of Taylor & Co. and Wade & Co. The bankrupts, at the time of the contract were indebted to the defendants in more than 440*l.*, and the defendants did not perform their contract, but misapplied the money, by putting it to the credit of Knapton & Co.'s account. The result was, that the acceptance for 54*l.* 15*s.* 6*d.* was dishonoured, and having been given for rent, the amount was obtained by distress on the bankrupt's goods. The other two bills were unpaid, and remained in the hands of the holders until the bankruptcy. These facts being admitted, my brother Anderson thought the plaintiffs entitled to recover 54*l.* 15*s.* 6*d.*, for the bankrupt's estate was unquestionably damnified to that extent; but he doubted whether they could recover more than nominal damages for the non-payment of the other bills, because supposing the ultimate loss to the bankrupt's estate to be the proper measure of damages, the non-payment of the bills produced none, for the holders of the bills thereby became entitled to prove for the amount, and if they had been paid, the bankers would have been unpaid precisely the same amount, and would have proved for exactly so much more than they did. My brother Anderson, therefore, directed a verdict to be entered for the plaintiffs for 54*l.* 15*s.* 6*d.* only, reserving leave to increase the amount to 440*l.*, if the court should think the plaintiffs entitled to recover the full amount. On the full consideration which this case has now undergone, we all concur in the opinion, that the plaintiffs are entitled to make this rule absolute. We do not think that

the ultimate loss to the bankrupt's estate, according to the results of the proofs upon it, without regard to the question, how much the bankrupt himself might have recovered, is the true criterion of damages. The debts due to the bankrupt, and the damages to be recovered by him for the breach of contracts relative to the bankrupt's personal estate, and which affects its value, pass as personal estate to the assignees, and become the property of the assignees. We need not inquire further as to the description of contracts, the damages for the breach of which belong to the assignees, for this question is still *sub judice* (a); but for this sort of contract, the assignees are undoubtedly entitled to recover, and stand in the place of the bankrupt himself, as to his right to recover, as they do with respect to his debts, for the recovery of which they have, by the 1 Jac. I. c. 15, s. 13; 6 Geo. IV. c. 16, s. 63; 1 & 2 Will. IV. c. 56, s. 25, the like remedy that the bankrupt himself had. His rights to personal estate are their rights, and the damages done to him in respect of his personal estate are due to them. What, then, is the amount of damages which the bankrupt would himself have recovered? A jury might most properly give the full amount of the money placed in the defendant's hands, and the jury in this case did give that amount contingently, provided they were warranted by law in giving the assignees the damages sustained by the bankrupt; and we think they were warranted. When the defendants refused to perform their contract, they ought to have returned the money to the bankrupts; and if they did not, the bankrupts might have treated it as money received to their use, and recovered the amount in *indebitatus assumpsit*. The circumstance of the defendants being their creditors to an equal amount is only so far material, as it would have given them a defence in that form of action under the statutes of set-off, which were enacted for the purpose of preventing the necessity of cross-actions; but it would have given a defence in consequence of the form of action only, not on the merits; and the form of action being changed into one of

(a) The learned judge is here alluding to the cases of *Spence v. Rogers*, 11 Mee. & W. 191, and *Drake v. Beckham*, Id. 315; 7 Jur. 204, in which writs of error are pending, in the former case, to the Exchequer Chamber, and in the latter to the House of Lords.

special assumpsit, there would be no defence at all. This is laid down in *Thorpe v. Thorpe*, 3 B. & Adol. 580, and in *Colson v. Welsh*, 1 Esp. 378, which was confirmed by the court on a motion for a new trial. The bankrupts clearly would have recovered the full amount against a wrong-doer, not a creditor—why should a wrong-doer, being a creditor, be in a better position, when the law gives him no right of set-off, either under the statute of set-off, or the mutual credit clause in the Bankrupt Act? It was well argued by Mr. Cowling, that, if a bill of exchange had been delivered to the defendants to be handed over, and the defendants had converted it to their own use, the creditors might have brought trover and recovered the full value of the bill at the time of the conversion; and that it made no real difference that money and not a bill was misapplied. The case of *Porter v. Vorly*, 9 Bing. 93, was, however, cited as an authority, that the true measure of damages was the amount of injury to the bankrupt's estate in the hands of the assignees, as distinguished from the damages recoverable by the bankrupt himself if he had been plaintiff. The case is, however, no authority for that position. The circumstances of it were very peculiar, and the court decided that only nominal damages were recoverable, because they thought that neither the bankrupt himself nor the plaintiffs, as assignees of the estate, had sustained any damages by the breach of the defendant's contract. We think, for the reasons before given, that the plaintiffs, as assignees, are entitled to recover all the bankrupts could have recovered for the breach of the contract declared on; and, consequently, that this rule must be made absolute.

Rule absolute.

CLAYTON v. CORBY.

Jurist 8, 212.

Trespass for breaking and entering a close of plaintiff, and digging up and removing clay, sand, &c. Plea, that the defendant was the occupier of a certain tenement and premises, to wit, a brick-kiln, and that he, as such occupier, and all the occupiers for the time being of the said tenement, for the full period of thirty years, had had and enjoyed, as of right and without interruption, a right to dig, take, and carry away from the place in question as much of the clay of the said close as was at any time required by him or them for the purpose of making bricks at his said kiln in every year, and at all times of the year. Replication, taking issue thereon:—Held, after verdict for defendant, that this plea was bad, as setting up an indefinite claim to take clay from and out of the close of the plaintiff.

Evidence of the exercise of the right in question whenever the party had occasion to do so, without shewing that it took place at all times of the year, is sufficient to support this plea.

Trespass for breaking and entering the close of the plaintiff, called Marlow Common, at the parish of Great Marlow, in Buckinghamshire, and digging up and carrying away the clay, sand, &c. Pleas: first, not guilty; secondly, that before and at the times when, &c., defendant had been and was the occupier of a tenement and premises, to wit, a brick-kiln, situate, &c., and that defendant, while he was such occupier, and all the occupiers for the time being of the said tenement, for the full period of thirty years next before the commencement of this suit, have respectively had and enjoyed, as of right and without interruption, and defendant still as of right ought to have and enjoy, a right to dig, take, and carry away, in, out of, and from the said close in which, &c., so much of the clay of the said close in which, &c., as was at any time required by him and them, his and their servants, for the purpose of making bricks in and at the said brick-kiln in every year, and at all times of the year. Justification in exercise of the said. Verification. Replication to the second plea, denying the user as of right for thirty years. At the second trial (*a*) before Williams, J., at Buckingham, at the summer assizes, 1842, evidence of the plaintiff's title was given, and it appeared that the alleged trespass had been committed on a tract of land called Marlow Common, being in extent about forty acres; that a brick-kiln had been erected on it by the lord of the manor, not fenced off from the common, and that defendant, and his predecessors in the occupation of the kiln, had dug clay in the locus in quo for use at the kiln from 1761 till the commencement of this action, but not every year, nor at all times of the year. The learned judge directed the jury, that it was not necessary to prove a user at all times of the year, but only as often as occasion required; and that where brick-making usually extended only over a portion of the year, it was sufficient to prove the user of the right in question during that portion. A verdict was found for the defendant. In Michaelmas Term, 1842, (Nov. 4),

(*a*) See the pleadings on which the former trial took place, 2 G. & D. 174; 2 Q. B. Rep. 813.

Byles moved for a new trial on the ground of misdirection, or for leave to enter a verdict for nominal damages. First, under the Prescription Act, 2 & 3 Will. IV., c. 71, s. 4, there ought to have been produced evidence of user every year; the right proved was not the right claimed by the plea to take clay "at all times of the year." [*Coleridge, J.*—The plea must be taken to except all times at which it was not lawful or convenient to work, as on Sundays and during the nights. *Lord Denman, C. J.*—If the evidence was that the defendant took clay wherever he would, that is evidence in support of the plea. *Carr v. Foster*, 6 Jur. 623, is a decisive authority against this objection.] Secondly, a right of this kind cannot exist in law; it is a claim of right to take away part of the substratum. There is no authority for such a general right.

Rule refused on the first point;

Rule nisi on the second point.

In last Trinity Term, (June 29) (*a*),

Biggs Andrews shewed cause.—[The judgment of the court renders it unnecessary to report the arguments on the point of unity of possession. (*b*)]—As to the application for judgment non obstante veredicto, it is said, in Co. Litt. 122, a., "There be also divers other commons, as of estovers, of turbary, of piscary, of digging for coals, minerals, and the like." In *Duberley v. Page*, 2 T. R. 392, and *Pepin v. Shakspear*, 6 T. R. 748, a common right of digging gravel and sand on the waste is recognised.

O'Malley, contra.—It is not contended that there can be no prescription for digging clay in a common, but that a prescription for a general right to dig turf, sand, or clay without limitation is bad at law: there must be some limitation to the claim. A claim of a right of common without stint cannot be supported.—*Benson v. Chester*, 8 T. R. 396, 401. "If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom against the law which excludes the

(*a*) Patteson, J., was absent.

(*b*) See *Clayton v. Corby*, 2 G. & D. 174; 2 Q. B. Rep. 813.

owner of the soil.”—Co. Litt. 122, a. In *Wilson v. Willes*, 7 East, 121, a custom that all customary tenants having gardens had dug turf from the waste, for the purpose of making improvements in their gardens as occasion required, and also a custom for taking turf for the purpose of making and repairing their banks, and for their hedges and fences, were held bad, as being indefinite and uncertain and destructive of the common. The claim here is not more limited. All the cases shew that the claim must be limited by the requirements of the house or land which the customary tenant occupies. He also cited *Wilkes v. Broadbent*, 1 Wils. 63; *Valentine v. Penny*, Noy, 142, cited in *Cruise’s Dig.*, vol. 3, p. 82; *Dean and Chapter of Ely v. Warren*, 2 Atk. 189; *Hayward v. Cunnington*, 1 Lev. 231; S. C., *Heyward v. Cunnington*, 1 Sid. 354; as a decision of the court that a plea setting up a right of cutting turf appurtenant to a messuage, without saying that it was to be consumed in the said messuage, was a bad plea.

Cur. adv. vult.

At the sittings in banc after Michaelmas Term (Dec. 5),

Lord DENMAN, C. J., delivered the judgment of the court. —In this case, an application was made on behalf of the plaintiff for leave to enter a verdict for nominal damages, notwithstanding the finding of the jury for the defendant on the second plea. [After stating the pleadings, his lordship proceeded :—] The question is, whether this plea (the second) can be sustained in point of law; and we are of opinion, upon general principles and the authorities connected with the subject, that it cannot. It is observable, that, in all cases of a claim of right in alieno solo, whether immediately or in any degree resembling possession, such claim, in order to be valid, must be with some limitations or restrictions. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle, without stint as to number; but such right is measured by the capability of the tenement in question to maintain the cattle during winter, and levancy and couchancy must be averred and proved. In the case of common estovers, or of liberty of taking wood, called in the books house bote, plough bote, and hay bote, such liberty is not vague and

indeterminate, but confined by some certain and definite rule. The allowing of common piscary, and the nature of such rights, is thus compendiously, but we believe correctly, given by Blackstone, in the 2nd volume of his Commentaries, p. 34:—“These several species of commons do all originally result from the same necessity as common of pasture, viz. for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire bote for his fuel, and house bote, plough bote, cart bote, and hedge bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.” That is for several definite purposes. In some of these instances, the thing taken is more or less immediately renewable; and it would seem strange, indeed, if such precision and certainty are required in them, but less in others where the claim is larger, extending, as in the present case, to a right to disturb and remove a portion of the soil itself. Upon reference however to the authorities, we find, that in cases not substantially distinguishable from the present, the same rule does (as in reason it ought to do) prevail. In *Wilson v. Willes*, 7 East, 121, the declaration was trespass for breaking and entering the plaintiff's close, called Hampstead-heath, and, digging and carrying away turf covered with grass. Plea, that the locus in quo was a waste, and parcel of the manor of Hampstead, within which there had been from time immemorial divers customary tenements by copy of court-roll: and then alleged the custom for the tenants of such tenements having a garden or gardens, parcel of the same, to dig turf for the purpose of making and repairing grass plots in such gardens every year, at all times of the year, as often and in such quantity as occasion had required; and so justified the taking. To this plea there was a general demurrer, and judgment was given for the plaintiff. Lord Ellenborough said that a custom, however ancient, must not be indefinite and uncertain; that it was not defined what sort of improvement the custom extended to, that every part of the garden might be converted into grass plots; that there was nothing to restrain the tenants from taking the whole of the turbary of the common, and that it resolved itself into the mere will and pleasure of the tenant. In *Peppin v. Shakespear*, 6 T. R. 748, the declaration was in

trespass, for breaking and entering the plaintiff's close; and the plea stated a grant to the defendant, Shakespear, of a customary tenement of the manor of which the locus in quo was parcel, and a custom for the tenants thereof to have common of pasture, and also the liberty of digging for the carrying away sand, &c., for their necessary repairs, and a justification of breaking into the locus in quo as parcel of the common for that purpose. The court gave judgment for the plaintiff on account of the defect in that plea, in which it was stated that the defendant entered, &c., for the purpose of digging for and carrying away sand, &c., *for the necessary repairs of the said defendant*; that no question could be made about any of the pleas (there having been others which it is not necessary for us to notice), but that in which it was stated that the tenement was a messuage, and with respect to that, that it ought to have been expressly alleged that the house was in want of repair, and that the defendant entered for the purpose of digging for and carrying away the sand for the necessary repairs of that house, and that he used the sand for that purpose. It is true, that these two cases respect the validity of a custom; but the reasons on which the judgments are respectively founded, have a strong bearing on the degree of certainty and precision with which a claim of right generally, in order to be supported, ought to be described. It remains now to be considered, whether the objection of vagueness and uncertainty be applicable to the plea in question or not. We think that it is. The nature of the tenement, when called a *brick-kiln*, leads to no conclusion, one way or the other, as to the extent of the claim and demand on the soil of the plaintiff. It may have been at the time of the trespass of any dimensions and capacity; it may have been during the thirty years of the alleged employment, continually varying, and consequently the quantity of clay required for the purpose of making bricks thereat may have varied also. There is no limit, no amount of clay measured by cart loads, or other requirements; no number of bricks, estimated by hundreds or thousands, claimed to be made. It is, therefore, an indefinite claim to take all the clay from and out of the said close, in which, &c., or in other words, to take from the plaintiff the ownership of the

whole close. The close of *Blewett v. Tregonning* (*a*), which was not very long ago decided in this court, went on the same ground; a similar claim was held to be insupportable. We are of opinion, therefore, that the plea cannot be sustained, and that there must be judgment for the plaintiff for nominal damages, notwithstanding the finding of the jury for the defendant on that plea.

Rule absolute accordingly.

DOE DEM. EVANS *v.* PAGE.

Jurist, 8. 399.

The 3 & 4 Will. IV. c. 27, s. 7, does not apply to cases where the tenancy at will had determined before the passing of the Act.

Ejectment on two demises by the lessor of the plaintiff, one on the 2nd January, and the other on the 22nd June, 1840. At the trial, before Wightman, J., at the Worcestershire Summer Assizes, 1842, it appeared that Thomas Evans, the father of the lessor of the plaintiff, in 1802, inclosed from the common about a quarter of an acre of land, on part of which he built a cottage. Thomas Evans died in 1816, leaving a widow and several sons and daughters, the lessor of the plaintiff being his eldest son and heir-at-law. On the death of Thomas Evans, his widow remained in possession of the cottage and a portion of the land, without any payment of rent, until her death, which took place in 1832. Upon her death, the defendant, who had married one of the daughters, and to whom Thomas Evans, in his lifetime, had given up the remaining portion of the land originally enclosed by him, took possession of the cottage and land occupied by the widow, and held at the time of the commencement of the action not as agent to the lessor of the plaintiff, but adversely to him. It was proved, that in 1809, the lessor of the plaintiff visited his mother, then residing in the cottage, and evidence was given of statements and declarations made by her as recognising her son's interest. On behalf of the defendant, it was contended first, that the possession of the mother had been adverse to the lessor of the plaintiff since 1816; or secondly, that even supposing she was tenant at will to the lessor of the plaintiff,

(*a*) See Adol. & Ell. 554.

still, as by the 3 & 4 Will. IV. c. 29, s. 7, the plaintiff's right would be deemed to have accrued at the expiration of one year after the commencement of the tenancy, i. e., in 1817, the lessor of the plaintiff would be barred at the time of bringing the action. The learned judge left it to the jury to say whether Mrs. Evans held as tenant at will to the lessor of the plaintiff. The jury found that Mrs. Evans held as tenant at will from the period of her husband's death; and a verdict was, therefore, entered for the lessor of the plaintiff, with leave to the defendant to move to enter a verdict for him.

R. V. Richards, in Michaelmas Term, 1842, having obtained a rule nisi accordingly.

Godson and Gray now shewed cause.—The 3 & 4 Will. IV., c. 23, s. 7, does not apply to estates which existed and were determined before the passing of the act; it might have been otherwise if the tenant at will had been alive on the 24th of July, 1833, when this statute received the royal assent. There are no words to make sect. 7 retrospective. The lessor of the plaintiff had a right to bring his ejectment at any time after the death of his mother; but he could not bring it before her death, until he had done some act to determine the tenancy at will; and he was within the time limited by sect. 2. *Doe dem. Bennet, v. Turner*, 7 Mee. & W. 226, and *Turner v. Doe dem. Bennett*, 9 Mee. & W. 643, are not applicable. It was not necessary to consider the effect of sect. 7 in the latter case. *Doe dem. Bennett v. Long*, 9 C. & P. 773, and *Doe dem. Stanway v. Rock*, 4 M. & Gr. 30, were also referred to.

R. V. Richards and J. W. Smith, contra.—In *Doe dem. Bennett v. Turner*, the correct construction is put upon sect. 7, that it is retrospective: that case was much considered, and is not distinguishable from the present. Sect. 2 has been referred to. That section limits the period within which any land or rent shall be recovered; and the other sections, upon some of which there have been decisions, engraft something upon, or explain the meaning of sect. 2. In *James v Salter*, 3 Bing. N. C. 544, sec. 3 is said to explain sect. 2. In *Neplean v. Doe dem. Knight*, 2 Mee. & W. 894, sect. 15 was held to be retrospective; so, in *Doe dem. Corbyn v. Bramston*,

3 Adol. & Ell. 63, was sec. 17. Doe dem. Burgess v. Thompson, 5 Adol. and Ell. 532, was similar to this case. Doe dem. Stanway v. Rock does not apply.

Cur. adv. vult.

At the sittings in banc after Hilary Term, Feb. 10.

Lord DENMAN, C. J., delivered the judgment of the court. —The lessor of the plaintiff in this case claimed as heir-at-law of his father, who died in November, 1816. From the time of the death of the father, the mother of the lessor of the plaintiff continued in possession of the premises in question as tenant at will to the lessor of the plaintiff until her death, which happened in July, 1832. Upon the death of the mother, the defendant, having no title himself, took possession of the premises, and remained in possession until the ejectment was tried, not as agent for the lessor of the plaintiff, but adversely to him, as found by the jury. The question is, whether the plaintiff's remedy is barred by the 7th sect. of 3 & 4 Will. IV., c. 27. The tenant at will died one year before the passing of that act, and, if the act had not been passed, the lessor of the plaintiff would have been in time with his ejectment, as the period of adverse possession, or rather the period when his right accrued, would have been calculated from the death of the tenant at will, in July, 1832, when the tenancy determined. It is said, by the 7th section of the statute, that the right, where there is a tenancy at will, is to be deemed to have accrued either at the determination of the tenancy, or at the expiration of a year next after the commencement of the tenancy. It may be that the effect of this section is to give a right of entry at the determination of the tenancy at will at any time within a year of its commencement, but at all events, within the expiration of a year from its commencement; and consequently it is contended, that the lessor of the plaintiff is too late, as the tenancy at will of the mother commenced in 1816, and the right of the lessor of the plaintiff would accrue in 1817, more than twenty years before the ejectment was brought. But we are of opinion that the 7th section only applies to cases of tenancies at will existing at the time the act passed, or subsequently, and that it does not apply to cases where the tenancy at will had been determined before

the passing of this act. The words of the 7th section are, when any person shall be in possession or in the receipt of the profits of any land, or in the receipt of any rent as tenant at will, the right of the person entitled, subject thereto, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of the tenancy at will, or at the expiration of a year after the commencement of the tenancy. The section is, in terms, only applicable to the case of a future, or at most of an existing tenancy at will, and not to the case of a tenancy at will which had been determined, and was not existing when the act passed. A different construction, even if the words permitted it, would cause the greatest hardship; for a person who, as the law stood before the passing of the act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would, by the operation of the statute, be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute, such as would enable persons who would otherwise be affected by it, to assert their right.

Rule discharged.

LACKINGTON v. ATHERTON.

Jurist, 8, 407.

Where goods were entered in the books of the West India Dock Company in the name of the original consignee as owner, such consignee having sold them to A., who had afterwards made a sub-sale to B., and had given to B. a delivery order for the goods upon the Company—held, that the right of A. to stop the goods in transitu was not thereby defeated, such order being one upon which the Company, according to their invariable custom, had declined to act, and had refused to deliver the goods to B. without an order from the original consignee.

VENDOR AND PURCHASER—DELIVERY OF GOODS—STOP-PAGE IN TRANSITU.—Trove by the plaintiffs, as assignees of Paul & Son, to recover the value of certain timber and deals. Pleas, not guilty and not possessed. There was also a suggestion upon the record of the death, after action brought, of Congreve, one of the defendants. At the trial of the cause, before Cresswell, J., at the sittings for Middlesex, held after last Michaelmas Term, it appeared that the timber in question formed part of the cargo

of The Sir William Bensley, from Quebec; that the ship arrived at the West India Docks on its homeward voyage in July, 1839, and proceeded then and there to discharge her cargo; and that, at that time, this timber having been consigned to one Tindal, was entered in the books of the Dock Company in that person's name. Whilst the timber was in the dock-yard, Tindal sold it to the defendants. On the 26th September, one Mr. Churchill, acting as the agent of the defendants, sold it to Paul & Son for the sum of 250*l.* 13*s.* 5*d.*, to be paid for by a bill at seven months. An invoice was accordingly made out and sent to Paul & Son by the defendants, together with a bill for the above, drawn by the defendants upon Paul & Son at seven months' date, which Paul & Son accepted, and returned to the defendants. That bill however, when it reached maturity, was dishonoured, and has always remained unpaid. At the time of the sale, a delivery order in favour of Paul & Son, directed to the Superintendent of the West India Docks, was signed by procuration for the defendants. On the 14th October following, this delivery order was sent by Paul & Son to the Dock Company, who, however, refused to deliver up the timber without an order from Tindal, in whose name the timber still stood. Their officer made the following memorandum:—"The annexed order cannot be executed. W. Tindal's order required. 12th October, 1839." And this memorandum was stated by the writer to have been made in accordance with the invariable practice of the Company, not to deliver up goods in their possession without a delivery order in the name of the person who appeared as the owner in their books. On the 30th October, a fiat in bankruptcy issued against the plaintiff, and on the 12th November, the defendants having obtained a delivery order from Tindal, received the timber from the Dock Company, and removed it away, contending that their right to stop in transitu had not determined. At the trial, the learned judge was of the same opinion, and accordingly nonsuited the plaintiff, leave, however, being reserved to move to enter a verdict for the plaintiff.

Channell, Serjt., having accordingly in last Trinity Term obtained a rule nisi for that purpose,

Byles, Serjt. (with whom was *Beetham*), now shewed cause.—The bankrupts had not such a possession of the goods in question as prevented the defendants from stopping them in transitu. *Dixon v. Yates*, 5 B. & Adol. 313. In that case, the vendor not having given a delivery order, which was proved to be the invariable mode of delivering goods sold, while they were in the warehouses in Liverpool, it was held, that no possession of the goods had been taken by the vendees, and that the vendor might, therefore, stop in transitu. In the present case, it is true that there was a delivery order, but it was one which was valueless and inoperative. In *Townley v. Crump*, 4 Adol. & Ell. 58, a party having goods in his own warehouse at Liverpool, sold them, and gave a delivery order: the goods, however, remained in the same warehouse unpaid for, until the vendee became bankrupt; and it was held, that, as between the original vendor and vendee, the right of lien was not divested by giving such delivery order. These cases are authorities for shewing, that, at the time the defendants retook possession of the timber, their right to a lien had not gone. If this be so, the nonsuit was right.

Channel, Serjt., contra.—The right to stop in transitu is an equitable right. It is not, therefore, for the defendant to set up for a defence the non-delivery of an order by Tindal, as being the only effectual one to pass the delivery of this timber, when they had themselves given an order which purported to have that effect. But the defendants having given, and Paul and Son having received, a delivery order upon a third person, that was equivalent to an actual delivery of these goods, so as to defeat the right of stoppage in transitu. That principle was established in the case of *Harman v. Anderson*, 2 Camp. 243. Lord Ellenborough there says, “After the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaser. The delivery note was sufficient, without any actual transfer being made in their books. From thenceforth they became the agents of Dudley, the bankrupt. They themselves might have a lien on the goods, and be justified in detaining them

till that was satisfied ; but, as between vendor and vendee, the delivery was complete, and the right to stop in transitu was gone." This principle was recognised in *Withers v. Lyss*, 4 Camp. 237. And in *Lucas v. Dorrien*, 7 Taunt. 278, it was expressly decided, that, after a contract for the sale of goods, and a written order on the wharfinger for delivery, communicated to the wharfinger, and assented to by him, though no actual transfer be made in his books, the property passes to the vendee. The case of *Dixon v. Yates* is distinguishable from the present, for the decision proceeded upon the ground of their being no delivery order ; and, in *Townley v. Crump*, the delivery order was not upon a third person, but by the warehouseman upon himself. Unless a delivery order, such as was given in the present case by the defendants, be held to have altogether divested them of all property in these goods, the interests of third parties who might subsequently have had transactions with the vendee, would be materially injured.

TINDAL. C. J.—This is the case of the assignees of persons who had not paid for goods they had purchased, seeking by an action of trover to recover their value from the vendors ; and the question is, whether, under the circumstances of the case, the vendors possessed the right to stop the goods in transitu ; and it appears to me, that they had, inasmuch as the stoppage took place before the timber was delivered to the bankrupts. To prevent the right there must have been an actual or a constructive delivery. Now actual delivery, it is clear, there was none ; but it is argued, that there had been a constructive delivery. Had the delivery order been in the name of Tindal, it is clear that its effect would have been to vest the possession of the goods in the bankrupts, for the Dock Company would have at once obeyed it ; but the order actually given was one, to have acted upon which would have been contrary to the invariable practice of the company in such matters ; and, accordingly, when it was presented by the bankrupts, it was treated as one altogether valueless, an order from Tindal being the only one which the superintendent was bound in the discharge of his duty to obey. I cannot, there-

fore, distinguish the present case from that of *Dixon v. Yates* in principle, although the facts are somewhat different. It has been argued, indeed, upon the part of the plaintiffs, that the defendants should be in a manner estopped from setting up the right to stop in transitu, by reason of having given a delivery order, by which they intended that all their interest in these goods should pass to the vendees. Had the relations between these parties been altered in consequence, there might have been force in this argument; but, as matters stand, this has not been the case; these goods have been purchased, but were unpaid for, and in strict law there was no delivery of them to the bankrupts. The nonsuit was therefore right.

COLTMAN, J.—I am of the same opinion. The only case which was cited by my brother Channell which bears at all upon the present was that of *Harmon v. Anderson*; for the circumstances of *Withers v. Lyss* were altogether dissimilar; and in *Lucas v. Dorrien*, the case did not turn upon the right to stop in transitu. Now, *Harmon v. Anderson* certainly decides, that, by a delivery note signed by the seller being lodged with the wharfinger, the possession of the goods in his custody becomes vested in the purchaser; but that is expressly upon the ground, that a wharfinger, after the notice delivered to him is bound to hold the goods on account of the purchaser. In the present case, on the contrary, the order given was one which was not only disobeyed by the Dock Company, but one which it would have been altogether contrary to their practice to have obeyed. It was in fact a nullity, and could not operate as a constructive delivery of the goods. The plaintiffs further say, that the suing out this delivery order by the defendants operated as estoppel, so as to prevent them from saying that they had not parted with the possession of the goods. But this objection cannot prevail, unless in consequence of the existence of this order, the situation of these parties has been altered; then, there is no pretence for saying that such has been the case.

ERSKINE, J., and CRESSWELL, J., concurred.

Rule discharged.

ALDRED *v.* CONSTABLE and BROWN.

Jurist 8, 336.

In an action by the assignees of a bankrupt to recover the proceeds of an execution upon a warrant of attorney alleged to have been given by way of fraudulent preference:—Held, that contemplation of approaching insolvency was sufficient to entitle the plaintiff to recover:—Held also, with reference to contemplation of bankruptcy, that, in order to make a preference fraudulent and void, it was not necessary to show that the party contemplated any particular act of bankruptcy, or that he regarded bankruptcy as absolutely unavoidable.

Trover. The material pleas were, not guilty and not possessed. At the trial before Parke, B., it appeared, that the action was brought against the sheriff by the assignees of Brown, a bankrupt, to recover the produce of an execution under a warrant of attorney, alleged to have been given by way of fraudulent preference to his father Charles Brown, for 315*l.* The facts are sufficiently stated in the judgment. The learned judge, in his summing up, left all the questions to the jury, the principal one being, whether the warrant of attorney was given by way of fraudulent preference, that is, whether it was a spontaneous and voluntary act of the party in order to give a preference to his father, and in contemplation of bankruptcy, that is, to defeat the equal distribution of his effects under the bankrupt laws. He further directed them, that if they were of opinion that the act was done in contemplation of being discharged under the Insolvent Act, it would not invalidate the warrant of attorney. The jury found that Brown did not execute the warrant of attorney in contemplation of bankruptcy; and a verdict was accordingly taken for the defendant, with leave to move to enter a verdict for the plaintiff on the plea of not guilty, and on the plea of not possessed, if necessary.

At the sittings after Hilary Term, Feb. 9, 1843.

Wortleg showed cause on behalf of the sheriff; and

W. H. Watson and *Pashley*, on behalf of the execution creditor.—The ruling of the learned judge was correct: nothing short of an actual contemplation of bankruptcy and of a distribution of effects under it, and of an intention to evade that distribution, will amount to a fraudulent preference. The origin of the doctrine of fraudulent preference is to be found

in the administration of the bankrupt law. (Gibbs, C. J. in *Fidgeon v. Sharpe*, 5 Taunt. 539; S. C., more fully in 1 Marsh, 196; S. C., 2 Rose, Cases in Bankruptcy.) [Coleridge, J.—That doctrine is now introduced into the insolvent law, 1 & 2 Vict. c. 110, s. 59.] *Morgan v. Brundrett* (5 B. & Adol. 289) established, that mere insolvency is not sufficient. It is said that insolvency is itself an act of bankruptcy, and therefore an insolvent party must contemplate bankruptcy; but by stat. 1 and 2 Vict. c. 110, s. 39, the filing of the petition constitutes the act of bankruptcy, and the fiat must issue within two months from the time of the obtaining an order for bringing up the debtor to be dealt with according to the provisions of the act. They cited *Wheelwright v. Jackson*, 5 Taunt. 109; *Bosanquet, J.*, in *Atkinson, v. Brindall*, 2 Bing. 225; S. C., 2 Scott, 369, 371; *Abbott v. Burbage*, 2 Scott, 636; *Gibson v. Boutts*, 3 Scott, 229; Lord Ellenborough, in *De Tastet v. Carroll*, 1 Stark. 88; *Linton v. Bartlett*, Cowp. 124; S. C. 3 Wils. 47; *Poland v. Glyn*, 4 Bing. 92, n.; 12 B. Moore, 109, n.

Bains and *Martin*, contra.—The learned judge omitted to state to the jury, that the contemplation of being discharged on filing a petition under the Insolvent Act was itself an act of bankruptcy; and he ought also to have mentioned other circumstances to the jury, which were evidence of the warrant of attorney being fraudulent at common law, without reference to bankruptcy. The giving of the warrant of attorney might itself be an act of bankruptcy. Any transaction which is fraudulent, by common law or by statute, and gives a preference to a creditor, is fraudulent, within the spirit of 1 & 2 Vict. c. 110, and the proviso in sect. 1 of 2 & 3 Vict. c. 29. (Note to *Twyne's case*, 1 Smith's Leading Cases, 13.) In *Gibson v. Boutts*, 3 Scott, 224, 229, *Bosanquet, J.*, said—"If a man, believing himself to be in danger of bankruptcy, voluntarily hands over money for the purpose of securing a favoured creditor, that, in my opinion, is a payment made in contemplation of bankruptcy within the meaning of the law, as laid down upon the subject of fraudulent preference." (*Fidgeon v. Sharpe*, 3 Taunt. 539; 1 Marsh, 196, recognises *Hartshorne v. Slodden*, 2 B. & P. 582.) They also cited the direction

of Lord Eldon to the jury in *Singleton v. Butler*, 2 B & P. 283. So here, the learned judge ought to have told them that all the circumstances should be taken into their consideration. (Ex parte De Tastet, 1 Mont. & Ayr. Cases in Bankruptcy, 193, n; 1 Deac. Bankrupt Law, 442.) There are two species of fraudulent conveyances under the statute; one where the transaction is made to assume the appearance of a sale of the goods by the bankrupt to the creditor; secondly, where, though it may amount to an absolute sale, yet it appears that the intention of the bankrupt was to give the creditor an undue preference.

Cur. adv. vult.

At the sittings in banc after term (May 17).

Lord DENMAN, C. J., delivered the judgment of the court (a). This was an action of trover by the assignees of a bankrupt against the sheriff and an execution creditor. The only material issue was, whether the warrant of attorney under which the defendant Brown, who was the bankrupt's father, sued out execution, was given to him by his son the bankrupt by way of fraudulent preference in contemplation of bankruptcy. The failing circumstances of the bankrupt were clearly proved, and his own expectation of going to prison in consequence of his embarrassments. Nor was it much questioned that he had voluntarily executed the warrant of attorney to his father; and the point on which the plaintiffs complained of misdirection was, that too much strictness had been required in proof of the contemplation of bankruptcy. The learned Baron Parke appears to have told the jury frequently, that contemplation of approaching insolvency was not sufficient; there was some evidence of an expression by the bankrupt, that he should probably soon be carried off to London, but that after a few weeks he should return and be reinstated in business by his father; but there was no declaration of his intending to become a bankrupt, nor anything which shewed his distinctly foreseeing that bankruptcy must fall upon him. The jury therefore could hardly have found any other verdict, if the issue had been the contem-

(a) Williams, J., was absent during the argument.

plation of insolvency, than one affirming that contemplation; and if they had been asked whether he contemplated any particular act of bankruptcy, they must have answered in the negative; but it is quite obvious that the contemplation of insolvency is so far from being inconsistent with that of bankruptcy, that it may be one of the material ingredients among others of proving it. Yet there appears to be some reason to believe that the avowed expectation of imprisonment was left to the jury rather as in contrast and opposition to the contemplation of bankruptcy. Again, we cannot conceive that a particular act of bankruptcy must have been in contemplation in order to make a preference fraudulent and void. We do not even find that bankruptcy must have been regarded as absolutely unavoidable; if, indeed, the bankrupt had expressed his intention to keep house, or to do any act which would have made him bankrupt, or if he had plainly declared his knowledge that he must shortly come within the bankrupt laws, the assignees would not fail to bring forward such evidence, which if satisfactory must insure their success; but the converse by no means follows; the absence of such proof does not negative their claim. In common language there is an intelligible difference between deciding to do a certain thing, and contemplating the probability of being driven to it. If a sinking debtor could be shewn to have said to a favourite creditor, "I know in a week I must either desert my place of business and become bankrupt, or go to prison and take the benefit of the Insolvent Act, and therefore I give you this warrant of attorney," it seems difficult to say that he did not contemplate bankruptcy. The numerous cases that have been reported in reference to this doctrine, cannot be reconciled. The older cases have been said to go too far in one direction; and one of the more recent may be thought to have transgressed the just boundary in the other direction; the former have been questioned more particularly by my brothers Littledale, Parke, and Paterson, in *Morgan v. Brundrett*, 5 B. & Adol. 289, because they were supposed conclusively to infer the contemplation of bankruptcy from that of insolvency, and to carry too far the principle of ascribing to all a man's acts

the intention to produce their consequences. My brother Parke there states his opinion that a preference given in contemplation of bankruptcy means "the intent to defeat the general distribution of effects which takes place under a commission of bankrupt;" no other judge appears to have adopted this view, which has been expressly denied to be correct, by Tindal, C. J. (*a*). In the old cases, the judges held to the effect that where bankruptcy was probable, and actually occurred, the contemplation of it must be presumed. In the late cases it would seem that this contemplation could not exist unless bankruptcy was known to be inevitable. In the last reported case, *Gibson v. Muskett*, 3 Scott, N. R. 429; S. C., 3 M. & G. 158, the contemplation of bankruptcy, formerly considered an undoubted question of fact, was stated to be substantially matter of law. We think that, however these words are construed, the proof of them must be referred to a jury; and probably that the learned judge on the late trial had in his view the disputed doctrine advanced by himself in this court in 1833, to which we find it impossible to subscribe. On the whole, we think that the jury have not been properly directed in this case, and consequently, that the rule for a new trial must be made absolute.

Rule absolute.

(*a*) See *Gibson v. Boutts*, 3 Scott, 229, 234; also *Simpson v. Sikes*, 6 M. & S. 295, 316.

THE UPPER CANADA JURIST.

CASES IN THE ENGLISH COURTS.

COOPER *v.* TAYLOR.

8 Jurist, 450.

EXECUTOR—DEVASTAVIT.—In an action against several Executors, who severed in their Pleadings, the Defendant pleaded Plene Administravit, except as to 865*l.*, for which sum judgment was accordingly signed, and upon which an Action of Debt, suggesting a Devastavit, was afterwards brought against the Defendant :—Held, that the production of the Judgment, and of a Writ of Fi.Fa. thereon, under which Goods of the Testator of the Value of 482*l.* only were seized, was sufficient Evidence of a Devastavit as to the Residue.

This was an action of debt brought upon a judgment which had been recovered by the plaintiff against the defendant and T. W. Tottie and J. H. Shaw, as executors of Jonathan Taylor, to be levied as to the sum of 865*l.* 0*s.* 1*d.*, part thereof, of the goods of Jonathan Taylor acknowledged by the defendant to be in her hands to be administered, and as to the residue, of the goods of Jonathan Taylor which should thereafter come to the hands of the defendant, T. W. Tottie, and J. H. Shaw, as executors. The declaration then suggested a devastavit by the defendant. The defendant pleaded that she had not wasted the testator's goods, on which issue was joined ; and as to 400*l.* 9*s.* 5*d.*, that a writ of execution had issued on the judgment, by virtue whereof 400*l.* 9*s.* 5*d.* was levied and paid over by the sheriff, in part satisfaction and discharge of the said judgment. The plaintiff entered a nolle prosequi as to 400*l.* 9*s.* 5*d.* At the trial before Williams, J., at the last Berkshire Summer Assizes, the plaintiff gave in evidence the record of the judgment mentioned in the declaration, whereby it appeared that the plaintiff had brought an action against the defendant, T. W. Tottie, and J. H. Shaw, to recover a debt due from J. Taylor. In that action it appeared that the three defendants varied in their pleas ; Tottie and Shaw pleading respectively plene administravit,

but the present defendant pleading *plene administravit* “except the sum of 383*l.* 6*s.* 7*d.* lawful money of Great Britain, and also except certain goods and chattels of the value of 481*l.* 13*s.* 6*d.*” The record then shewed a *nolle prosequi* as to Tottie and Shaw, and interlocutory judgment against the defendant as to the assets so confessed by her, with judgment of assets in future against the three defendants. A writ of inquiry was executed thereon the 2nd November, 1830, and final judgment signed in Michaelmas Term in the same year for 1280*l.* 13*s.*, damages and costs. The plaintiff then gave in evidence a writ of *fi. fa.* issued on the said judgment to the sheriff of Yorkshire, indorsed to levy the sum of 865*l.* 0*s.* 1*d.* It was admitted, that, by virtue of the writ, the goods of the said J. Taylor mentioned in the defendant’s plea were seized and sold by the sheriff for 420*l.*, and that the produce of the sale, after deducting the sum of 19*l.* 10*s.* 7*d.* for the expenses of the sale and sheriff’s poundage, was paid over to the plaintiffs in the action, but that no other payment had been made in satisfaction of the judgment. On the 15th November, 1830, the defendant gave to the plaintiff a cheque upon Messrs. Brown and Co., bankers in Leeds, for 380*l.* Messrs. Brown had in their hands the sum of 383*l.* 6*s.* 7*d.* standing in the joint names of the defendant, Tottie, and Shaw, as executors of Jonathan Taylor. Messrs. Brown refused to pay the cheque on presentment, having received a notice to that effect from Shaw. In August, 1830, a creditor’s bill was filed in Chancery by Gaunt, one of the creditors of Jonathan Taylor, against his executrix and executors, for an account and an equal distribution of his assets; and, in February, 1831, an order was made by the court that the executrix and executors of Jonathan Taylor should pay into the Bank of England the said sum of 383*l.* 6*s.* 7*d.*, and interest; which was done. Upon these facts appearing at the trial, the learned judge was of opinion that a *devastavit* by the defendant had been proved; and it was accordingly agreed that a verdict should be entered for the plaintiff for 464*l.* 10*s.* 5*d.*, leave being reserved to the defendant to move to enter a nonsuit, if the court should be of a contrary opinion, or to move to reduce the damages to the sum of 383*l.* 6*s.* 7*d.*

Talfourd, Serjt., having obtained a rule nisi in Michaelmas Term last upon both grounds—

Bompas, Serjt., (with whom was *W. J. Alexander*), now shewed cause.—The first ground upon which this rule was obtained is the only one which need be argued, since the plaintiff is ready to abandon his claim to more than 383*l.* 6*s.*, the money which the defendant, by her plea to the original action, admitted to be in her hands, as executrix of Jonathan Taylor. That admission of assets unadministered is conclusive against her. (Notes to *Wheatley v. Lane*, 1 Saund. 219 b). Having once admitted on record that she had assets, unless she exposed them to the execution by the sheriff, she has been guilty of a *devastavit*; (*Erring v. Peters*, 3 T. R. 686); and to an action of debt upon the judgment, suggesting that *devastavit*, “an executor cannot plead plene administration, or any other plea of the same nature which puts his defence upon want of assets, for such plea would be contrary to what is admitted by the judgment.” (1 Saund. 219 a; *Rock v. Leighton*, 1 Salk. 310; *Shelton v. Hawling*, 1 Wils. 258; *Blackmore v. Mercer*, 2 Saund. 402 a). So neither can an executor be allowed to prove by evidence a defence which he would not be permitted to place by a plea upon the record. (Williams on Executors, &c., 3rd ed., 1563). But if he were, the facts, as they were proved at the trial, were quite sufficient evidence of a *devastavit*. (*Leonard v. Simpson*, 2 Bing. N. C. 176). The proceedings which have taken place in Chancery cannot affect the liability of the defendant, for they occurred long after the *devastavit* had been committed.

Channell, Serjt., (with whom were *Bros* and *Selje*), contra.—The only question here is, whether, under the facts of the case, the defendant can be said to have wasted the assets of the testator. The *devastavit* should be proved by evidence, and the production of the judgment is not of itself sufficient or conclusive proof. In all the cases cited the defendant was the sole executor; here, the defendant is one of three executors, and the judgment in the original action is a judgment against the three. That being so, the admission by the defendant of assets was only an admission that the assets were in the hands of the three; and if that be so, the evidence in

the case shews, that, so far as the defendant was concerned, she endeavoured, by drawing a cheque upon the bankers with whom the money was deposited, to satisfy the judgment, and thus to prevent a devastavit. The defendant could not have pleaded to the original action in any other way than she did.

TINDAL, C. J.—The verdict given in this case was right. The defendant pleaded that she had not wasted the testator's goods; and, to contradict this, the plaintiff shewed at the trial that the defendant had by her plea in the original action admitted being in possession of assets unadministered, in money, to the amount of 383*l.* 6*s.* 7*d.*, no portion of which had been paid in satisfaction of the judgment recovered against the defendant. It now turns out that the plea by the defendant in the original action was not in accordance with the facts; for it cannot be said that she had the money in her hands, when it was subject to the control of her co-executors. The circumstance of there being two other executors, who did not join in that plea, is one adverse, rather than favourable to the defendant, for it tended to mislead the plaintiff into believing, that, in the course of administration, this money had come into the hands of the defendant alone. However, since the defendant admitted being in the possession of assets, she was bound to shew that she had properly administered them; she did not do so, and the verdict against her for the amount so admitted was, therefore, right.

ERSKINE, J.—I am also of opinion that the verdict recovered against the defendant should stand for the sum of 383*l.* When called upon to plead to the original action, the defendant had the option either of denying or of admitting assets, and she chose to admit assets. Now, according to all the authorities, she cannot afterwards, whatever may be the circumstances of the case, turn round and say that she had not assets.

MAULE, J.—I also think that this verdict should be sustained. The question is, whether the defendant, having, upon a judgment, which is not questioned, admitted that she had 383*l.* 6*s.* 7*d.* in her hands, available for the payment of the testator's debts, must not be taken to have committed a devastavit, unless she shews that the money has been applied

to that purpose. The admission of assets must be thus construed; for to interpret the plea in any other way, would be to allow a deception to be practiced upon the plaintiff. Then, assuming this to be so, is there any evidence that she has disposed of these admitted assets in any way, so as to make her liable. Cases might be put where the non-payment to the plaintiff would not amount to a devastavit; but, in the present case, there is the issuing of a *fi. fa.* for a large amount, and the fact that the defendant gave a cheque upon a banker, which was dishonoured. This was evidence that she was called upon to pay and omitted to do so; and by giving the cheque, she also admitted that she was a person liable to pay the money. This seems to me to be quite sufficient evidence of a devastavit.

CRESSWELL, J.—I think that the defendant is estopped from saying that she had not assets to satisfy the plaintiff's demand. She had notice of that demand, and proposed to satisfy it. It is no answer for her to say, that at the time she pleaded to the original action, she had not the assets which she then admitted herself to be possessed of.

Rule discharged.

BOODLE *v.* CAMPBELL.

S Jurist, 475.

PLEADINGS—PAYMENT—LANDLORD AND TENANT.—To an Action of Debt upon an Indenture of Demise for Rent in arrear, the Defendant cannot plead Payment to a Party to whom the Premises had been conveyed by the Plaintiff prior to the Demise by him to the Defendant.

Debt for rent in arrear upon an indenture of Demise. Plea, as to the sum of 40*l.* 10*s.*, parcel &c., that the plaintiff ought not further to maintain her action thereof, because the plaintiff, being seised in her demesne as of fee of and in parcel of the said demised premises, afterwards, and before the making of the indenture in the declaration mentioned, conveyed the said parcel of the said demised premises to one E. B. The plea then, after setting out the particulars of the conveyance by the plaintiff to E. B., the death of E. B., and a devise of the said parcel by him to A. B. and J. P., proceeded to aver, that, after the commencement of this suit, the said A. B. and J. P. gave notice to the defendant of the premises in the plea mentioned, and then required the defendant

to pay to them such portion of the said rent reserved by the said indenture in the declaration mentioned, not paid over to the plaintiff at the time of the giving of the said notice, as might, on a just apportionment of the said rent, be found to be the just proportional part thereof in respect of the said parcel of the said demised premises ; and that the said A. B. and J. P. then gave notice to and threatened the defendant, that, if he should neglect or refuse to pay over to them such proportional part of such rent, the said A.B. and J.P. would immediately proceed to eject and expel the defendant from the said parcel of the said demised premises, and would put the law in force against the defendant as they might be advised. The defendant then averred, that, at the time the rent fell due, and when the notice was given, the said sum of 40*l.* 10*s.*, would be and was the just proportional part of the said rent in respect of the said parcel of the said demised premises, and that, at the said time of the giving of the said notice, the said sum of 40*l.* 10*s.* was wholly unpaid to the plaintiff; that the said rent, whereof the said sum of 40*l.* 10*s.* was parcel, accrued and became due and payable to the plaintiff, under and by virtue of the said indenture in the declaration mentioned, after the death of E.B.; and that, if the defendant had not paid to A. B. and J.P. the said sum of 40*l.*, 10*s.*, parcel as aforesaid, the said A. B. and J. P. would have proceeded to eject and expel the defendant from the said parcel of the said demised premises, and to have duly put the law to force against the defendant pursuant to the said notice ; wherefore the defendant afterwards, and after the commencement of the suit, did necessarily and unavoidably pay to the said A. B. and J. P. the said sum of 40*l.* 10*s.*, as he lawfully might for the ²cause aforesaid ; and that the plaintiff never had anything in the parcel of the said demised premises, except as appeared in the plea. Verification, Demurrer, assigning for cause that the plea altogether denied the title of the plaintiff, and amounted to a special plea of nil habuit in tenementis, as to parcel of the premises, which the defendant was estopped from pleading. The defendant joined in demurrer.

Channell, Serjt., with whom was *Willis*), for the plaintiff.—

The plea is bad in substance. If it be intended as plea of eviction, it is bad, for not alleging that the eviction was before action brought. Nor is it, in effect a plea of payment. This is not like the case of an annuity, or rent-charge issuing out of lands, the payment of which by the tenant operates as a payment by him to his landlord. (*Sapsford v. Fletcher*, 4 T. R. 511; *Taylor v. Zamira*. 6 Taunt. 523; *Pope v. Biggs*, 9 B. & C. 245). Here the defendant has not discharged any charge upon the land.

Talford, Serjt., contra.—The plea is good. It is a special plea of payment. In *Pope v. Biggs* it was held, that a mortgagee, having given notice to the tenants holding the mortgaged premises under leases granted by the mortgagor after the mortgage, was entitled to receive from these tenants the rents actually due at the time of notice, as well as those which accrued due afterwards. So the plea in the present case alleges that the plaintiff, before the indenture of demise was executed, had conveyed away her interest in a portion of the premises to other parties, who gave notice to the defendant, that, if he neglected to pay the rent to them, they would expel him from the premises. This brings it within the authority of *Johnson v. Jones*. (9 Adol. & Ell. 809), where to an avowry for rent, the tenant pleaded payment of it to a mortgagee to whom the premises had been mortgaged in fee before the demise of the plaintiff, and who had demanded payment from the plaintiff, and threatened “to put the law in force” in case of refusal. The court held, that, in substance such plea was a plea of payment.

Channell, Serjt., in reply.—In *Johnson v. Jones* the court, no doubt, held that the plea pleaded was not one of eviction, but of payment. But the ground upon which it was so held was, that the payment made by the tenant was to a mortgagee, who had a charge, by virtue of his mortgage, upon the land. This distinguishes it essentially from the present case. Here there was no debt due by the plaintiff; how, then, can a payment by the defendant to a third person operate as a payment to the plaintiff?

TINDAL, C. J.—It appears to me that this plea cannot be sustained. In its form, it is either a plea of eviction, or

of payment. If intended to be one of eviction, the defendant should have shown such eviction before the rent became due : instead of which, he alleges, that the threat to evict was not made until after action brought. Then is it a plea of payment ? Cases have arisen, where, as in *Sapsford v. Fletcher*, (5 T. R. 511). to an avowry for rent in arrear, the tenant has been allowed to plead payment of a ground-rent to the original landlord ; but that is because the ground-rent is a charge issuing out of the land, and one, therefore, for which the tenant is liable to a distress, unless he make the payment. So there is the case where the premises have been mortgaged, and it has been held, that payment by the tenant of the interest due to the mortgagee operates as a payment of rent in arrear from such tenant to his landlord. There, the mortgagee may be said to be constituted the special agent of the mortgagor, to receive the tenant's rent. But here, it appears that the defendant's lessor had parted with a portion of the premises before the demise of the defendant. Again, how can the court say that this particular sum of 40*l.* 10*s.*, to which this plea is pleaded, is, more than other sums which might be named, the amount due in respect of that portion ? Who can say that the devisees would be satisfied with this apportionment, or why should we be called upon to hold that 40*l.* 10*s.* is the sum which a jury would say is rightly their due ? Besides, the rent cannot, in point of law, be apportioned here, for the defendant is not tenant at all to the devisees. Since, then, it does not appear that this sum, so alleged to have been paid by the defendant, was any charge upon the land, or any debt due by the plaintiff to the parties to whom the payment was made, it cannot be said to be a payment by the defendant to the plaintiff.

COLTMAN and ERKSINE, JJ., concurred.

CRESSWELL, J.—I entirely agree with the rest of the court. In the case of *Johnson v. Jones*, Mr. Justice Littledale held, that the plea was good, not as being a voluntary payment to one who claimed under a prior title, but because the payment was made in respect of a mortgage which the tenant was compelled to pay. Now, I agree that the present plea is not, in substance, a plea of *nil habuit in tenementis*, but

then it is either a plea of eviction or of payment. In the former supposition, it is bad for not alleging an eviction before the rent became due ; in the latter, it is bad for not shewing that the payment made was in respect of a charge upon the land.

Judgment for the plaintiff.

STEAD *v.* CAREY.

8 Jurist, 605.

PRACTICE—IRREGULARITY, WAIVER OF.—Where a Plaintiff had obtained an Order of a Judge for a week's time to reply, and at the expiration of that time, had signed Judgment, upon the ground that the Defendant had pleaded a non-issuable Plea :—Held, that the Plaintiff had taken a step in the Cause which prevented him from availing himself of the Irregularity, and, therefore, that such judgment must be set aside.

This was an action on the case for the infringement of a patent. The defendant, being under terms to plead issuably, pleads rightly, that no company or joint-stock had been formed under the stat. 4 & 5 Vict., (a private act heretofore obtained by the plaintiff for the better carrying out of his patent for wood paving), and, therefore, that the said act had become inoperative, and the patent void. On the 6th May, the pleas in the cause were delivered to the plaintiff's attorney, together with the usual rule to reply. Thereupon a summons was taken out by the plaintiff for leave to sign judgment; but this summons was not attended. A second summons was then taken out for time to reply, and, upon such summons, an order was made giving the plaintiff a week's time to reply. Upon the last day of that week judgment was signed by the plaintiff.

Manning, Serjt., having obtained a rule nisi to set aside this judgment.

Shee, Serjt., now shewed cause.—The eighth plea was clearly a non-issuable plea, for the act of Parliament therein referred to has no effect one way or the other on the validity of the patent; and the defendant being under terms to plead issuably, the plaintiff was right in signing judgment. In moving for the rule it was contended that a step in the cause had been taken by the plaintiff in obtaining an order for further time to reply, and which, therefore, cured the irregularity committed by the defendant ; but the merely availing himself of

a judge's order for further time to reply is not taking a step in the cause. The judgment was signed within the week so allowed. [*Maule, J.*—But that was after the expiration of the usual time allowed to a plaintiff to reply in.] But the plaintiff did nothing in the cause until he signed the judgment.

[*Maule, J.*—You say that standing still is not taking a step. Yes.

Manning, Serjt.—Admitting, for the sake of argument, that the plea in question was not an issuable plea, the plaintiff waived the irregularity by obtaining an order for a week's time to reply. *Trott v. Smith* (9 Mee. & W. 765) is an express authority upon this point. Parke, B., in that case, says, "If the plaintiff had replied to this plea, he certainly could not afterwards have signed judgment. Then, does he not, by applying for time to reply, admit that there is something to reply to? whereas his case now is, that the plea ought not to be upon the file at all, by reason of the non-compliance with the judge's order."

PER CURIAM.—That is a case in point. The rule must be made absolute for setting aside this judgment.

Rule absolute.

SMALLCOOMBE v. OLIVIER.

8 Jurist, 606.

A Supersedeas of a Commission of Bankruptcy under the old Bankrupt Law and the annulling a Fiat under the 1 & 2 Will. 4, c. 56, have no retrospective Effect, so as to invalidate Acts done under the Commission or Fiat: and therefore,

Where a writ of Fieri Facias was taken out against a Party against whom a Fiat in Bankruptcy had issued and Assignees chosen, the Sheriff having returned nulla bona:—Held, that the return was not falsified by a subsequent Order of the Lord Chancellor annulling the Fiat.

An Order made by the Court of Review, that a Fiat in Bankruptcy shall be annulled, if the Lord Chancellor shall think fit; has no operation until confirmed by the Lord Chancellor.

This was an action against a Sheriff for making a false return of nulla bona to a fieri facias, in which the defendant pleaded the general issue. and the truth of the return. At the trial, before Lord Abinger, C.B., it appeared, that, before the fieri facias was delivered to the sheriff, a fiat in bankruptcy had issued against the execution debtor, and assignees appointed; whereupon the sheriff, on the 10th August, returnen nulla bona. On the 18th July an order was

made by the Court of Review, that the fiat should be annulled if the Lord Chancellor should think fit; who accordingly, on the 11th August, made an order to annul the fiat, under the 1 & 2 Will. 4, c. 56, s. 19. On this evidence the jury found a verdict for the plaintiff, the learned judge reserving leave to the defendant to enter a nonsuit, if the court should be of opinion that the above state of facts did not establish the plaintiff's case. A rule for this purpose having been obtained, the case was argued in* Easter Term, when

The Solicitor-General, J. Russell, and W. J. Alexander shewed cause; and

Erle and Montague Smith were heard in support of the rule.

The fulness of the judgment renders the insertion of the arguments unnecessary; it will be sufficient to add, that the following authorities were referred to:—6 Geo. 4, c. 16, ss. 78, 87, 92, 93, 94; 1 & 2 Will. 4 c. 56, ss. 2, 19: *Eden's Bankrupt Law*, 432; 1 *Mont. & Ayr. B. L.* 518, 525; *Deacon's B. L.* 832; *Ex parte King*, (2 Ves. jun. 40); *Ex parte Jackson*, (8 Ves. jun. 533); *Ex parte Edwards*, (10 Ves. jun. 104); *Ex parte Lavender*, (18 Ves. jun. 18); *Ex parte Bowler*, (Buck's Bankruptcy Cases, 258); *Ex parte Smith*, (Id. 262, n.); *Gould v. Shoyer*, (4 M. & P. 635; 6 Bing. 738); *Allen v. Dundas*, (3 T. R. 125); *Bridge v. Walford*, (6 M. & S. 42); *Godson v. Sanctuary*, (4 B. & Adol. 255; 1 N. & M. 52); *Lovic v. Crowder*, (8 B. & C 132); *Garland v. Carlisle*, (2 C. & M. 31; 4 M. & Scott, 24; 3 Tyr. 705); *Balme v. Hutton*, (3 M. & Scott, 1; 9 Bing. 471; 1 C. & M. 262; 2 Tyr. 620); *Towne v. Crowder*, (2 C. & P. 355); *Twogood v. Hawkey*, (Buck, 65).

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B.—The question in this case arises on a return of nulla bona. The plaintiff, having obtained judgment against a party, lodged a fieri facias with the sheriff; previous to which, however, a fiat in bankruptcy had issued against the debtor, and assignees were appointed; whereupon the sheriff made a return of nulla bona. It further appeared, that, before the return of the writ, the Court of Review had made a conditional order for annulling the fiat, which order

* Before Pollock, C. B., Parke, Anderson, and Rolfe, BB.

was, after the return, made absolute by the Lord Chancellor. The debtor had, at the time of being declared bankrupt, goods which would have been seizable but for his bankruptcy. Under these circumstances, the jury found for the plaintiff, with leave reserved to the defendant to enter a verdict, if the court should think that the facts proved did not establish the plaintiff's case. A rule for this purpose having been obtained, cause was shewn last term. On the part of the plaintiff it was contended, that, the fiat having been annulled, the rights of the parties must be considered to be in the same situation as if no such fiat had ever issued ; so that the goods must be deemed to have been all along the property of the debtor, and the return of nulla bona consequently false. On the part of the defendant (the sheriff) it was argued that the order of the Court of Chancery, annulling the fiat, had no retrospective effect : that the goods, therefore, being the goods of the assignees at the time the return was made, that return was strictly true. The statutes now in force relative to the transfer of property of bankrupts are the 6 Geo. 4, c. 16, s. 63, and the 1 & 2 Will. IV., c. 56, s. 25. By the first, it is enacted, that "the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of the bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, wheresoever the same may be found or known, and such assignments shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees ; and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, &c.; but such assignees shall have the like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt." By the subsequent act, it is provided, that, "when any person hath been adjudged

a bankrupt, all his personal estate and effects, present and future, which by the laws now in force, may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall be absolutely vested in, and transferred to, the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully, to all intents, as if such estate and effects were assigned by deed to such assignees, and the survivor of them; and as often as any such assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose." In the present case, the debtor had been regularly adjudged bankrupt before the issuing of the fieri facias, so that all his goods, according to the express provisions of the act, were vested in the assignees and ceased to be his property; and the return of the sheriff was, consequently, true, unless the subsequent order had the effect of making it false. In the first place, we think it is quite clear that the question turns on the effect of the order of the Chancellor, not on that of the Court of Review; for, until the Chancellor made his order, that of the Court of Review had no operation, and must be considered rather in the light of a representation to the Chancellor than an act having any force of itself. By the 19th section of the 1 & 2 Will. IV, ch. 56, the statute establishing the Court of Review, it is enacted, that "it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled, and such order shall have all the force and effect of a writ of supersedeas of a commission, according to the existing laws and practice in bankruptcy." So that the point now altogether resolves itself into this: What effect, under the old law, would a supersedeas have had on a return of nulla bona, made during the continuance of the commission, and of the assignment of the goods of the

bankrupt to the assignees ? It may be observed, that the object of all the statutes relating to bankrupts has been to apply all, or a competent part of, the bankrupt's estate in satisfaction of his debts, either by sale and distribution of the proceeds, or by making over the property to third parties ; and it is to be further remarked, that in order to effect this object, those who are called on to administer the property should have an absolute and indefeasable right vested in them, in order that purchasers and others dealing with them may be secure. Unless, therefore, there is something very clear in the statute, or the construction already put on it, the court would be unwilling to give power to the Court of Chancery to do an act which would have the effect of defeating or altering the effect of previous transactions with the property of the bankrupt. The plaintiff says that the writ of superse-deas, under the old practice, had the effect of annulling the commission, and of putting all parties, the bankrupt, debtors, and creditors, in the same position as if no commission had ever issued. It is, certainly, a very startling proposition that, while the commission is in force, (assuming, of course, all the legal requisites to have been complied with), the assignees might have brought an action against the bankrupt debtor, who would have had no defence ; but, (according to the plaintiff's argument), if the commission were afterwards superseded, the debtor must pay the debt twice over. Again, suppose the assignees were to contract to sell, and A. agree to purchase, property belonging to the bankrupt, a court of equity would compel the purchaser to perform his contract, and pay the purchase-money ; yet the plaintiff now says, that the purchaser might, by an act over which he had no control, or after any lapse of time, except so far as he might be protected by the Statute of Limitations, be deprived of his property. But even more startling consequences than these would follow from the position contended for by the plaintiff's counsel. If the bankrupt does not surrender within the time limited by the fiat, or make concealment of his effects, or embezzle any part of his estate, he shall be guilty of felony ; yet it is now contended to be in the power of the Lord Chancellor, by a subsequent act, to undo it all, and render

him innocent. Again, while the fiat continues in force, if the bankrupt omits to surrender within the proper time, the officer is justified in using force to apprehend him, or even take away his life, if resisted by him in the attempt; and is it possible to contend that the Lord Chancellor may give a supersedeas or equivalent act a retrospective operation, so as to make that murder which was an act of duty at the time it was done? These, no doubt, are extreme cases, but they serve to test the correctness of the principle; and many others might be added. But what reason is there for giving such a construction to the writ of supersedeas? We can discover nothing in the Bankrupt Act or any other statute in force, to shew any such; and the case must, therefore, be determined on the general principles of common law, and the legal effect of this supersedeas ascertained by analogy. Fitzherbert in his *Natura Brevium*, p. 236, gives many instances of the writ of supersedeas; but in none of them can we discover any effect further than that of ordering the party to whom they are directed to cease from further proceedings. The general effect is confined to that which remains to be done when the writ issues. Thus, in case of a supersedeas to a sheriff to discharge on bail a party taken in execution, the writ desires the sheriff to supersede further proceedings in execution. So, where a party indicted before justices of the peace, and put in exigent, has found sureties in Chancery to appear at the day of the return of the process against him, he may have a supersedeas to the sheriff not to arrest him, and, if he have already done so, to set him at liberty. It is needless, however, to multiply examples; several more will be found in Fitzherbert, in none of which is there any suggestion of the writ's having a retrospective effect. The same observation applies to a supersedeas of a commission of the peace, which has no effect on acts done before it was issued. Such being the nature and effect of the writ of supersedeas in other cases, what reason can be assigned for giving it, in the case of bankruptcy, the effect contended for by the plaintiff? We can discover none. The language of the supersedeas in such cases is very nearly the same as in any other; it merely commands the commissioners "to stay and surcease all further proceedings on the

commission, and to supersede the same accordingly." The authorities cited shew that these latter words ought to have the same effect, namely, that stated in Fitzherbert, of abstaining from *further* proceedings. But there are other reasons to lead to the same conclusion. The administration of the bankrupt's estate was formerly carried into effect by the commissioners. This was established by the statute 13 Eliz. c. 7. in which the Chancellor was empowered to appoint by commission honest discreet persons as commissioners of the estate and effects of the bankrupt, who were to have full power to take order and direction with the body of the bankrupt, and his lands, tenements, and hereditaments, money, goods, and chattels, and also to make sale of the lands of the bankrupt, as well as of the goods. Under this statute bankrupt's estates were administered previous to the 5 Geo. II, c. 30, s. 26, which first introduced the appointment of assignee, who were then placed in the same situation as the commissioners in respect of the property of the bankrupt; and this was the law until the passing of the 1 Will. IV. c. 56, when a fiat was substituted for a commission. Let us now proceed to consider the effect of a supersedeas under the commission which took its force under the statute of Elizabeth. By the first bankrupt act, 34 & 35 Hen. VIII, c. 4, power is given to the Lord Chancellor and other high officers therein named to administer the bankrupt's estate not by means of commissioners, but according to their own discretion. All sales made and acts done by them were to have the same effect as if they had been by the bankrupt himself; and it is quite clear, that, previous to the 13th Eliz. c. 7, no power existed in the Lord Chancellor to undo the effect of all the acts which he and the others had done; while it is hardly reasonable to suppose that the legislature, when they passed the statute of Elizabeth, intended to give him such a power, which did not exist before, namely, of defeating by supersedeas all that had been done by the commissioners. The object of the statute of Elizabeth was to carry out that of Henry VIII; but the argument of the plaintiff goes to shew that the powers given by the first statute were more stringent than those in the second. This therefore is another reason why the supersedeas previous

to the 1 & 2 Will. IV. c. 56 could not have had the effect contended for. It is further to be observed, that, whenever a supersedeas issues, a writ of procedendo may issue afterwards, and put an end to the supersedeas. Now, the Legislature never could have meant to give the Chancellor power to issue writs, which should have the effect not only of investing or divesting property already divested or invested, but of making acts criminal which were innocent at the time they were done, and vice versa, and of altering from time to time the character of such acts. It is no answer to this, to say, that the Chancellor will, in his discretion, take care not to issue a supersedeas or procedendo when they would produce such effects. The Chancellor may never *intend* to do so, but the present case shews how impossible it would be to guard against such evils to third persons from the exercise of such a power. On all these grounds, it appears to us, that the only effect of a supersedeas is to deprive the commissioners of the power of proceeding further, and that it has no effect on acts done before it was issued; consequently, that the sheriff's return in this case was strictly true, and he is entitled to our judgment. But we must not endeavour to conceal from ourselves, that, in thus deciding, we are acting in opposition, not, indeed, to much of judicial *decision*, but certainly to *dicta* of the very highest authority; promulgated from time to time, and under circumstances which leave no reasonable doubt that those high authorities entertained a directly contrary opinion to ours. In the case of *Ex parte Leaverland*, (1 Atk. 145), Lord Hardwicke refused to supersede a commission of bankrupt, on the ground that it would have the effect of defeating the bankrupt's certificate. Now, the question of the bankrupt's certificate rests on a different ground from that of the disposal of his property: perhaps the continuance of the fiat is necessary to the continuance of the certificate, for if there be no fiat in force, the parties will have no benefit. Similar language was used by the same judge in other cases; and there can be no doubt, from the expressions used, that he was of opinion that the effect of the supersedeas would be to undo

what had been done under the commission. We have not been able to discover any dicta between the time of Lord Hardwicke and that of Lord Eldon; but Lord Eldon has, on frequent occasions, gone the full length of stating that the effect of the supersedeas of a commission was to put all parties in the position they were in before. This appears from the cases of *Ex parte Jackson*, (8 Ves. jun. 533), *Ex parte Edwards*, (10 Ves. jun. 104), and *Ex parte Smith*, (Buck, Bankruptcy Cases, 262, n.); and there are many other cases in which similar language fell from him. The case of *Ex parte Smith* is, however, one in which he seems to have acted on this principle. In that case, Lord Eldon said, "The court had been for ages in the habit of calling on the second assignees, in cases where a first commission had been superseded, to confirm all sales of the bankrupt's estate made by former assignees. Now, it need not have done that, if the legal estate, notwithstanding the supersedeas, still remained in the first assignees." This, it must be admitted, is a direct decision on the point; not indeed, entitled to as much weight as if it had been an adverse suit, but still a decision sufficient to shew the confidence of Lord Eldon in his former opinion. All the other cases were mere dicta, in which a supersedeas was refused, lest it might prejudice parties; and we do not attribute much weight to them; for the doubt and uncertainty on the point might be sufficient to justify a judge, less cautious than Lord Eldon, in refraining from doing an act which might injure a third party. These observations do not, however, apply to the case of *Ex parte Smith*, which, we are bound to say, we think was not rightly decided. In a case of such importance as the present, we think it right to state fully the reasons which have induced us to differ from the authorities referred to. It might well be contended, in the present case, that, the property being in the assignees at the time the sheriff made his return, even if the effect of annulling the fiat were to restore all the property to its former owners, and place them in the same situation as if no fiat had ever issued, still, that the general rule ought to be subject to an exception in favour of

a public officer like a sheriff, who is bound to make a return, who makes a return, and the only one which he could make at the time. Our decision may, therefore, be supported on this narrow ground; but we feel bound to say, that the reasons which induce us to differ from Lord Eldon appear to us so satisfactory, that we shall act on them in future. This rule must, therefore, be made absolute.

Rule absolute.

REG. V. SEALEY.

8 Jurist, 496.

Where no demand has been made on the officer of a corporation to do an act, the performance of which is sought to be enforced by mandamus, the court will not allow the writ to go, as previous demand and refusal are necessary.

Under a local act of the 34 Geo. III., for the regulation of the tolls and duties of the port of Bridgewater, the receiver of revenues for the corporation is annually directed to deliver, at the Midsummer quarter sessions for the county of Somerset, an account of the receipts and expenditure under the statute, to which account so delivered any toll-payer may object. The receiver is further directed to furnish to such person on demand, after the 30th day of April, a copy of the account intended to be delivered in. A subsequent section of the act empowers the quarter sessions to reduce such tolls or cease collecting them altogether, should the produce of the impost exceed the expenditure. The defendant in this case is the treasurer for the corporation; and no such account having been delivered at the quarter sessions for upwards of thirty years.

E. W. Cox now moved for a mandamus to be directed to the receiver of revenues and treasurer for the mayor, aldermen, and burgesses, commanding him to deliver an account at the next sessions. [*Coleridge, J.*—How do you put the receiver in the place of the town-council?] Because he is the treasurer for the mayor, aldermen, and

burgesses of Bridgewater. [*Coleridge, J.*—The receiver is to render an account to the quarter sessions, and, I presume, annually.] That was so. [*Coleridge, J.*—Has a demand been made at the expiration of the stated period?] A demand has been made, but whether at the stated period did not appear. [*Coleridge, J.*—Has it occurred to you to consider the bearing of the Municipal Corporations Act on this question?] *Cox* admitted that it had not, as the application was made with reference to a local act.

COLERIDGE, J.—The Municipal Corporations Act may have reference to it. You had better mention the case again on Monday, and amend the affidavits if necessary.

Cox again moved on Monday, the 27th, and submitted, that, as a sum had been received more than sufficient to satisfy the purposes for which the act had passed, the court would allow the writ to go. The affidavit on which the motion was made shewed that a demand had been made, and an account had been delivered shewing a balance of 1200*l.* in hand, a sum sufficient to cause a considerable reduction in the tolls. Mr. Sealey had not, however, delivered in his annual account, as he was required to do, and hence the quarter sessions were unable to make the reduction. It was therefore submitted that the court would allow a mandamus to go to the receiver, to deliver the account at the next sessions. [*Coleridge J.*—Has any demand been made to deliver the account at the quarter sessions?] A demand had been made, and it had been complied with, to deliver a copy of the account to the party on whose affidavit the application had been made.

COLERIDGE, J.—That is not sufficient. If I were to allow the writ to go as prayed for, the return would be that a demand had not been made, as in law there ought to have been, for the performance of this duty. In order to induce the court to grant a high prerogative writ, it should be satisfactorily shewn that a previous demand and refusal had been made. If, after having taken these steps, he refuses or neglects to comply at the next quarter sessions, you can then come to the court for redress.

Rule refused.

DOE DEM. STRATFORD V. SHALL.

8 Jurist, 538.

Where Judgment is set aside in an Action of Ejectment, and Possession ordered to be restored by the Lessor of the Plaintiff if he does not proceed to Trial and establish his title at the next Assizes, a Writ of Restitution will be awarded if the Lessor of the plaintiff fails to do so, although he was alone prevented by the Misconduct of his own Attorney, and although the Title be still undetermined. Such Order to restore Possession need not be specifically directed to the Party.

A rule had been obtained to shew cause why a writ of restitution should not issue to compel the lessor of the plaintiff to restore possession of four cottages at Weston, Berkshire, under these circumstances:—The plaintiff brought ejectment in December last under the will of one John Ayers, to whom they belonged, and who devised them in remainder to the plaintiff after a life estate. Shortly after he signed judgment for want of a plea, and was put into possession under the usual writ of *facias habere*. This judgment and execution was set aside on affidavits by the defendant, to the effect that his tenants had given him no notice of the service of declaration, and possession was “ordered to be restored to the defendant, unless the defendant does not succeed in establishing his title, or the lessor of the plaintiff fails to proceed to trial at the next Abingdon Assizes.” Neither the plaintiff nor his attorney appeared at the trial, and he was nonsuited. The order setting aside the judgment had been duly served upon the plaintiff subsequently, and possession demanded, which he refused to give until he was shewn some further authority from this court to do so.

J. C. Symons now shewed cause.—The facts alleged in the affidavits put in by the defendant are correct: those of the plaintiff disclose a case of peculiar hardship, which claims an indulgent exercise of the discretion of the court. The plaintiff, who is a labourer, was alone prevented from trying his cause by the trickery of his attorney, whom he states he has reason to believe acted in collusion with the defendant, and he directed the plaintiff to be at Abingdon on the day after that on which the trial was to be called on; he accordingly attended with seven witnesses the day after he had been nonsuited. He declares that he has a good title to the property,

and that he can and will proceed to trial at the next assizes. Under these circumstances the court has no power, it is submitted, to award a writ of restitution. It can alone issue where the title to property has been already determined by a judgment, or where the facts raise no question of title in the party by whom restitution is sought. (2 Lilley's Pract. Regist. 273). In *Doe d. Williams v. Williams* (2 Adol. & Ell. 381), the case was stronger against the plaintiff, for the pleas had been delivered; and, though the writ had been irregularly issued, the judgment is clearly on the ground of want of proof of title. This very principle is laid down, under somewhat similar circumstances, by Coleridge, J., in *Doe d. Lord v. Stevens*, (2 Nev. & P. 604), and on that ground the writ was refused, and the case distinguished from *Goodright d. Russell v. Noright*, (Barnes' Notes, 178), where the plaintiff had absconded, and from *Doe d. Pitcher v. Roe*, (9 Dowl. P. C., O.S., 971), where there had been a forcible entry. Here, the defendant does not pretend to deny the title which the plaintiff asserts, and which he has had no opportunity of proving. Under these circumstances justice will be done by discharging this rule; the approaching assizes will give the plaintiff the means of establishing his title, and till he has failed in doing so, the court will not disturb his possession. *Doe d. Ingram v. Roe*, 11 Price, 507). [Coleridge, J.—The court has power to mould the rule, and may order possession to be restored.] The court sometimes does so, but only in favor of the party whose case is one of hardship, and where justice cannot otherwise be done. Here, the hardship is on our side, and the court will not impose the disadvantage upon the counsel for the plaintiff of opposing a rule of which the rule to shew cause has given him no intimation. The plaintiff is in possession under a perfectly regular writ, and under the authority of this court, and he is not in contempt of the subsequent order of the court by retaining it, for he has virtually complied with the condition it imposes by coming to the trial. [Coleridge J. I do not think so; he is surely bound by the express terms of that order.] If so, it is submitted, that the defendant is equally bound by the letter of the order, and has no power to require the plaintiff to restore possession, for the

wordsofitare, that possession “be restored,” without specifying by whom; and Lord Denman, C. J., expressly lays it down, in *Doe d. Williams v. Williams*, (2 Adol. & Ell. 381), that it must be addressed “to the party.” It may be that the sheriff is to restore. [Coleridge, J.—It is, I think, sufficiently implied that the party is to restore who has possession.]

Selfe, contra.—The hardship is with us, for the defendant himself built the cottages. An order to give us possession is not enough, for the plaintiff already refuses to obey such order. The case cited shews no reason whatever why this writ should not be granted. The plaintiff was a poor man, and an attachment would be useless. (He was stopped.)

COLERIDGE, J.—I think that this rule may be made absolute. An irregular judgment was set aside, and the plaintiff has failed to restore possession upon the terms of the order, which, I think, he was bound to do. When the judgment was set aside, a writ of restitution might have issued. Instead of that, the plaintiff was allowed to retain possession on condition that he proceed to trial; he did not do so, and it would require an affidavit much stronger than this to establish the charge of collusion. The case of *Doe d. Lord v. Stevens*. (2 Nev. & P. 604), and the remark I there made, applies to the cases in Barnes’ Notes, and to *Doe d. Pitcher v. Roe*, (9 Dowl. P. C., O. S., 971), and what I then said is not inconsistent with my decision in this case. I do not think that there is sufficient reason to withhold this writ.

Rule absolute without costs.

BAXTER v. NURSE.

8 Jurist, 273.

CONTRACT—HIRING.—The presumption that a general hiring is a hiring for a year, is not an inflexible rule of law, but a question of fact to be determined by the Jury when considering the evidence in the cause; and, therefore, in the case of an action brought by the editor of a newly-established periodical, who had suddenly been dismissed from his situation, to recover a year's amount of salary, the Judge was held to have rightly left it to the Jury to say whether the principle which was proved to be in force with respect to old-established periodicals, that an engagement as editor was always understood to be for a year, applied also where a new literary speculation had been entered upon.

This was an action of assumpsit, brought by the plaintiff, who had acted as editor of a new weekly scientific periodical called "The Illustrated Polytechnic Review," to recover the amount of one year's salary, as such editor, under the following circumstances:—It appeared at the trial, before Tindal, C. J., at the Middlesex Sittings after last Michaelmas Term, that the plaintiff had agreed with the defendant, at his request, to become the editor of this newly-projected review, at a salary of three guineas per week; but nothing was said as to the time the engagement was to last. The first number of the review appeared on the 1st of January, 1843, and the plaintiff acted as its editor, receiving the salary agreed upon, until after the publication of the third number, when he received a note from the defendant, dispensing with his further services. The plaintiff protested against this dismissal; but that being disregarded, the present action to recover a year's salary was brought. At the trial, several literary gentlemen were called, who deposed, as the course of dealing in the case of an engagement as an editor of periodicals of long-established reputation, to the effect, that such contracts were always understood to be for a year; but no witness swore that such was the case with respect to periodicals which were newly started. Upon the question, whether the engagement with the plaintiff was for a year certain, the Lord Chief Justice, in summing up the evidence, left it to the jury to say whether the ordinary and established rule which prevailed in cases of old-established literary undertakings, obtained also where a new literary speculation

was entered upon. The jury found a verdict for the defendant.

Bompas, Serjt., now moved on behalf of the plaintiff, for a rule calling upon the defendant to shew cause why this verdict should not be set aside, and a new trial had, upon the ground of misdirection. There is no such distinction in law between a contract with reference to a new work, and one which is long established. The rule of law is, that a general hiring is for a year, unless the contrary be shewn to have been the intention of the parties to the contract. Here there was no evidence to shew such a contrary intention; and the jury should, therefore, have been directed that a contract for a year must be presumed. In *Beeston v. Collyer*, (4 Bing. 309), where a clerk brought a similar action to the present, Best, C. J., in giving judgment, says, "If a man hire a servant, without mention of time, that is a general hiring for a year." And Gaselee, J., lays it down, "That there can be no doubt that a general hiring is for a year. In domestic service there is a common understanding that such a contract may be dissolved on reasonable notice, as a month's warning or a month's wages. There does not appear to be any such practice with respect to servants in husbandry, and we have no evidence what is the custom with respect to clerks. We must, therefore, decide according to the general rule, and hold the contract between the parties to be a hiring for a year."

TINDAL, C. J.—Upon the ground which has been taken in moving for this rule, that the jury should have been directed in accordance with the general rule, that, a hiring having been proved, they must presume it to have been for a year, no evidence of a contrary intention having been brought forward, I think there is no such inflexible rule in questions of this nature as has been contended for, and that a judge therefore would be wrong in so laying down the law to a jury. It is not like the case that the consideration of a contract under seal need not be proved, or that a consideration for a promissory note must be presumed until the contrary is shewn, or that twenty years' user gives a

right to the enjoyment of an easement. These are all rules of law; but the principle, that a general hiring is presumed to be for a year, is one based upon what is conformable to general usage, and is always to be gathered from all the circumstances of the case as they are submitted to the jury. The course which is in practice pursued in trials of this nature strengthens the position. Persons are always called by the plaintiff to depose to the fact, that, by the usage existing amongst them, a general hiring is always considered as one to be in force for a year; and the jury are directed by the judge to say, that unless they see something in the circumstances which distinguishes the particular case, they should find a general hiring; it is then a finding by them upon the course of dealing between the parties. This case was never raised to one of a general hiring at all; but even if it had been, the direction of the judge would have been right. All the witnesses who were called deposed as to what was the course of dealing in cases of engagements upon periodicals of established reputation; and it was not an improper observation, nor one upon which the jury were not warranted in acting, that a different principle might be applied in cases where the undertaking, as here, was new, and therefore of an uncertain continuance. Nothing more unreasonable can be said than that the defendant should be compelled to pay the plaintiff for a year, when the publication itself ceased after the expiration of three weeks from the date of the engagement.

COLTMAN, J.—I also think that this case was left by the Lord Chief Justice to the jury in as favourable a point of view as the plaintiff was entitled to. I do not stop to inquire whether, in cases relating to literary publications, the rule respecting general hirings ever applied; but, assuming that it did, as in the ordinary case of a settlement by hiring and service, yet the sessions rule may always be rebutted by the evidence in the case; thus, if there be a reservation of weekly wages, a general hiring becomes one only from week to week. Here, upon the facts which were proved, there was quite sufficient for the

jury to say, that a hiring for a year was not contemplated by these parties.

ERSKINE, J.—I am also of opinion that my brother Bompas has failed in pointing out anything wrong in the direction of my lord. Assuming that the general rule or principle applies to a literary engagement like this, here the foundation of the rule fails; there was no general engagement proved. The question of the terms upon which the contract was made was one for the jury; and it was quite proper for them to be asked whether they thought it probable that, for a new work, the defendant would enter into any such agreement.

CRESWELL, J.—I think my lord did right in leaving this case to the jury in the way he did at the trial. To support the plaintiff's case it was necessary to prove a contract for a year; of this no direct evidence was given, but there was evidence of usage produced to shew that the contract was entered into by both parties with the implied understanding that it was to exist for a year. It cannot be contended successfully, that the circumstances from which such an understanding was to be implied were not for a jury; and, in my opinion, it was by no means an unimportant ingredient in the case, that the contract was entered into with respect to a new publication, and that, for that reason, such an implication would be unreasonable. But it is also said, that the law will presume from a general hiring, a hiring for a year. Here no such general hiring was expressly proved, but the jury were asked to infer it from circumstances, which, such as the work being done by the week and the payments being made by the week, were equally consistent with a hiring for such a time, as one for a year. As I understand the rule upon this question, it is, that in all cases, if there be proved a hiring for an indefinite period, and nothing more, the presumption is, that the contract was entered into for a year; but that, if anything more be proved, it then becomes a question of fact, upon all the circumstances of the case, for the jury to determine; in the words of Lawrence, J., in *Cutter v. Powell* (6 T. R. 326), who says, "that with regard to the

common case of a hired servant, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So, if the plaintiff could have proved any usage, that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage." I think, therefore, that the terms of the hiring was quite an open question, and that this case was properly left to the jury.

Rule refused.

THE UPPER CANADA JURIST.

CASES IN THE ENGLISH COURTS.

CAHOON *v.* BURFORD.

8 Jurist, 499.

In an action of assumpsit on the warranty of a horse, a special count on the warranty, alleging as a breach that the horse was unsound, and the plaintiff put to expense about the attending, taking care of, and returning him to the defendant, may be joined with an indebitatus count for money had and received, to recover the price of the horse, without violating the R. G. H., 4 Will. IV., r. 5, which prohibits the use of several counts founded on the same subject-matter of complaint. Semble—that, in determining whether counts have been inserted in violation of the above rule, the court will only look at the record, and not at the bill of particulars.

Assumpsit. The first count was in the usual form on a warranty of soundness of a horse; in which the breach was, “yet the defendant did not perform or regard his said promise, but thereby deceived and defrauded the plaintiff in this, that the said horse, at the time &c., was not sound; but, on the contrary thereof, was then unsound; whereby the said horse then became and was of no use or value to the plaintiff; and the plaintiff expended monies to the amount, &c., about the attending and taking care of the said horse, and returning same to the defendant.” The second was a common indebitatus count for money had and received to the use of the plaintiff. An application had been made to Gurney, B., at chambers, to strike out this second count, as pleaded in violation of the R. G. H., 4 Will. IV., r. 5, (Pleading Rules), which provides, that, “Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each;” and it was contended, that the special and common counts were substantially for the same cause of action, within the meaning of this rule. The learned judge having referred the parties to the court,

Miller now moved accordingly, and mentioned, that the plaintiff, by his bill of particulars delivered under the common count, had stated that part of the declaration brought to re-

cover the price of the horse, and argued, that that price was equally recoverable under the first count.

Jervis appeared to shew cause in the first instance.

ALDERSON, B.—The only question for us to decide is, does it appear on the face of the second count, that it is for the same cause of action as the preceding count? Now, it is plain that it is not, and this rule, therefore, ought not to be granted. The first of these counts is to recover damages for the breach of a warranty of a horse; the other is for the recovery of money paid to the defendant, on the ground that the consideration for which it was advanced is at an end. The price of the horse may be in some degree the measure of the unascertained damages sought to be recovered in the first count, but that count is not for the price of the horse. If, as suggested, the plaintiff has precluded himself by his bill of particulars from giving evidence, the defendant may avail himself of that circumstance at the trial; but that does not affect this question as it appears on the record. The rest of the court concurring,

Rule refused.

DAVIS v. CLARKE.

8 Jurist, 688.

A bill was drawn by J. H. upon J. H.; across the bill was written, "Accepted H. J. C." H. J. C. was sued as acceptor:—Held that H. J. C., not being the person to whom the bill was addressed, could not be charged as acceptor.

Declaration on a bill of exchange, (indorsee against acceptor), stated, that a bill was drawn by one J. Hart, directed to the defendant, and accepted by him. Plea, that the defendant did not accept. Upon the trial, before Parke, B., at the Summer Assizes, 1843, for the county of Essex, it appeared that the bill of exchange, when produced, was in the following form:—

"£100.

"London, 8th March, 1830.

"Twelve months after date, pay to me or my order one hundred pounds, value received.

"To Mr. John Hart.

"John Hart."

Across the bill was written, "Accepted, H. J. Clarke; payable 319, Strand." It was thereupon objected that there was a variance between the bill declared upon and the bill pro-

duced ; and the learned baron being of that opinion, the plaintiff was nonsuited. A rule having been obtained in the following Michaelmas Term to set aside the nonsuit,

Sir *F. Thesiger*, S.G., now showed cause.—*Polhill v. Walter* (3 B. & Adol. 114) is in favour of the defendant, and upon it he relies. The defendant, by writing his name across the bill, does not, strictly speaking, make himself acceptor, though, possibly, it may make him liable as security for it. *Gray v. Milner* (3 Moore, 90) is distinguishable. There, the bill was addressed to no one ; but the defendant, by writing his name upon the bill, constituted himself the acceptor.

Petersdorff, contra.—The defendant is described in the declaration as acceptor, though the bill is drawn upon Mr. J. Hart. In *Polhill v. Walter* the point was not distinctly brought before the court. This case is similar to *Gray v. Milner*. The defendant, by his acceptance, has adopted the bill, and is estopped from denying that he is liable upon it. Where the document is ambiguous, it may be treated either as a bill of exchange or as a promissory note, at the will of the plaintiff. He also referred to *Jackson v. Hudson* (2 Camp. 447).

Lord DENMAN, C. J.—There is no authority in our law, or elsewhere, for the position that one person may accept a bill of exchange which is drawn upon another. What is laid down in *Polhill v. Walter*, and by Lord Ellenborough in *Jackson v. Hudson*, is this, that if a person other than the drawee writ an acceptance upon a bill in the usual form, he is not liable as an acceptor, though he may be sued on his collateral undertaking. I am of opinion, that this person is not liable as acceptor ; and it is very desirable, that the usage with respect to bills of exchange should be well known and understood.

PATTESON, J.—There is no case exactly like the present. In *Jackson v. Hudson* the bill was addressed to Mr. J. Irving, and accepted by Irving, and afterwards specially by Hudson. Here the bill was addressed to J. Hart, and not accepted by him, but accepted by the defendant. In *Gray v. Milner* the bill was addressed to no one ; that case is the extreme of what is convenient, and probably the bill was there accepted by

the person to whom it was intended to be addressed. This bill appears to be drawn by the drawer upon himself, and I know no reason why he might not do so, thought it may be very absurd. Then, it is argued, that defendant is estopped from denying his acceptance; but on the face of the bill he is not the acceptor, and great confusion would arise if acceptances of this kind were to be permitted.

WILLIAMS, J.—I am of the same opinion. The question is, whether the defendant is bound as the acceptor of this bill of exchange. It is quite clear that Hart and Clarke are different persons, and that the bill is addressed to Hart; then the defendant is not acceptor.

COLERIDGE, J.—The safe course is to make the custom and usage of merchants the rule; that custom and usage is well known. I make no presumption as to Hart. If Hart and Clarke are different persons, then another person than he to whom the bill of exchange is addressed has come in and accepted it; if they are the same person, that might alter the character of the bill, and it might be looked upon as a promissory note.

Rule discharged.

DANIEL *v.* GRACIE.

8 Jurist, 708.

In replevin, the first cognisance as to part of the goods distrained stated, that plaintiff held and enjoyed a certain marl and slack pit, as tenant thereof, at a rent of 8*d.* for each and every cubic yard of marl and slack dug and gotten by plaintiff from and out of the said pit, payable quarterly, &c. The second cognisance, as to the residue of the goods, stated, that plaintiff held and enjoyed a certain brick mine, as tenant thereof, at the rent of 1*s.* for every 1000 bricks made and burnt by the plaintiff from the said mine, payable quarterly:—Held, that the rent reserved was capable of being reduced to a certainty, and therefore a distress would lie.

Replevin. The first count was for goods taken in a dwelling-house; the second count was for goods taken in a close. As to the first count, the defendant made cognisance for rent due from the plaintiff in respect of the said dwelling-house, by virtue of a certain demise, at a yearly rent of 30*l.*, for one year, ending on the 12th November, 1841. As to the second count, except as to the taking of certain of said goods and chattels therein mentioned, to wit, &c., the defendant, as bailiff of the said Richard Edward Creswell, well acknowledges the taking of the said cattle, goods, and chat-

tels in that count mentioned, except as aforesaid, in the said close in which, &c., and justly, &c.; because, he says, that the plaintiff, for a long time, to wit, for all the time during which the rent hereinafter next mentioned to be distrained for was accruing due, and from thence until and at the said time when, &c., held and enjoyed a certain marl and slack pit, in and parcel of the said close, in which, &c., in the said last count of the declaration mentioned, as tenant thereof to the said Richard Edward Creswell under a certain demise thereof theretofore made, at a certain rent, that is to say, the sum of 8*l.* for each and every cubic yard of marl and slack dug and gotten by the plaintiff from and out of the said pit, payable quarterly, to wit, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in each and every year, and because a large sum of money, to wit, the sum of 16*l.* 16*s.* 11*d.* of the rent last aforesaid, for and in respect of divers, to wit, 506 cubic square yards of marl and slack, dug and gotten by the plaintiff from and out of the said pit during the quarter of a year ending on the 25th day of December, A.D. 1841, and the part of another quarter, to wit, the quarter then next preceding, became and was, on the day and year last aforesaid, due, and from thenceforth and until and at the time when, &c., was in arrear and unpaid to the said Richard Edward Creswell, the defendant, as bailiff to the said Richard Edward Creswell, well acknowledges the taking of the said goods and chattels in the introductory part of this cognisance mentioned; the same then being in and upon the said marl and slack pit, so being parcel of the said close, in which, &c., and justly, &c., as for and in the name of a distress for the said rent so due and in arrear as last aforesaid, &c. And as to the residue of the said last count of the said declaration, the defendant (as bailiff of the said Richard Edward Creswell) well acknowledges the taking of the said cattle, and the residue of the said goods and chattels in that count mentioned, in the said close, in which &c., and justly, &c.; because, he says, that the plaintiff for a long time, to wit, for all the time during which the rent hereinafter mentioned to be distrained for was accruing due, and from thence until and at the time when, &c., held and

enjoyed a certain brick mine, in and parcel of the said close, in which, &c., in the said last count mentioned, as tenant thereof to the said Richard Edward Creswell, under a certain demise thereof, theretofore made at a certain rent, that is to say, the sum of 1s. for every 1000 bricks made and burnt by the plaintiff from the said mine, payable quarterly, to wit, the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in each and every year, and because a large sum of money, to wit, the sum of 13s. 4d. of the rent last aforesaid, for and in respect of divers, to wit, 8000 bricks made and burnt by the plaintiff from the said mine during the quarter of a year ending on the 29th day of September, A. D. 1841, became and was, on the day and year last aforesaid, due, and from thenceforth and until and at the time when, &c., was in arrear and unpaid to the said Richard Edward Creswell; he, the defendant, as bailiff to the said Richard Edward Creswell, well acknowledges the taking of the said cattle, and the said residue of the said cattle, goods, and chattels, in the said last count mentioned, in and upon the said brick mine, in and parcel of the said close therein mentioned, in which, &c., and justly, &c., as for and in the name of a distress for the said rent so due and in arrear as last aforesaid.—At the trial, before Williams, J., at the Stafford Summer Assizes, 1843, it was proved by the agent for Mr. Creswell, the landlord, that, in September, 1840, he agreed to let to the plaintiff the house at a yearly rent of 30l., and a marl and slack pit in a field behind the house, together with the use of the surface; and that the plaintiff was to pay 8d. a solid yard for all the marl and slack that he got; such payments to be made quarterly, at the four usual quarter-days of the year. He further proved that the plaintiff agreed to work a brick mine belonging to Mr. Creswell, and to pay 1s. per thousand for all bricks made by him; such payments also to be made quarterly. It was objected by the counsel for the plaintiff, that the agreement proved was not in the nature of a demise, but a license, and that such an interest required a note in writing, in pursuance of the Statute of Frauds. A verdict was given for the defendant upon all the issues, leave being reserved to the plaintiff to

move to enter a verdict upon the third and fourth issues. A rule nisi having been obtained accordingly in the following Michaelmas Term,

In Easter Term, (May 10),

Whateley and *Greaves* shewed cause.—There was a demise of the marl pit, and not a mere license. In *Bac. Abr. "Leases,"* (K), it is said, "Here it may be laid down for a rule, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose." *Doe d. Hanley v. Wood* (2 B. & A. 724) is distinguishable, because in that case there was no demise of the surface. [They also cited *Crosby v. Wadsworth*, (6 East, 603.)]

E. Yardley, contra.—There was no evidence of a tenancy, to which a right to distrain is incident. The payments to be made under the agreement are uncertain. It is at most a tenancy at will. Until rent had been paid, there was nothing to fix the duration of the lease, and no right to distrain accrued. [He cited *Hegan v. Johnson*, (2 Taunt. 148); *Dunk v. Hunter*, (5 B. & A. 322); *Hamerton v. Stead*, (3 B. & C. 478); *Regnart v. Porter*, (7 Bing. 451); *Riseley v. Ryle*, (11 Mee. & W. 16.)]

LORD DENMAN, C. J.—The ascertaining of rent by an inquiry of this nature is a new point. *Cur. adv. vult.*

In this term, (June 3),

LORD DENMAN, C. J., delivered the judgment of the court.—After stating the cognisances to the second count, and the facts proved at the trial, his Lordship proceeded:—The principal question is, whether a rent was reserved upon these demises, for which a distress lies. And upon this question, we find it laid down in *Co. Litt.* 96. a., "It is a maxim in law, that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty: for, id certum est, quod certum reddi potest; for, oportet quod certa

res deducatur in judicium; and, upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet, in some cases, there may be a certainty in uncertainty; as, a man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometimes a greater number, and sometime a lesser number there; and yet this uncertainty, being referred to the manor, which is certain, the lord may distrain for this uncertainty. *Et sic de similibus.*" And again, in commenting upon the nature of rent services, in Littleton's Chapter of Rents, 142 a, he says, "Rent must be certain, or which may be reduced to a certainty; for, *id certum est, quod certum reddi potest.* And the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money." In the present instance, the payment is to be in money, and the amount of the rent *certum reddi potest*, in the one demise, by the number of cubic yards of marl and slack dug and gotten by the tenant, and, in the other, by the number of bricks burnt by the tenant. The rule will, therefore, be absolute, for entering a verdict for the defendant upon the issues joined to the pleas to the above cognisances.

Rule absolute accordingly.

WAKEFIELD v. NEWBON.

8 Jurist, 735.

A. mortgaged, with the usual proviso for repayment, and a covenant for re-conveyance at the costs and charges of the mortgagor. Upon notice to repay the sum borrowed, the mortgagor's solicitor sent the solicitors for the mortgagee a draft re-conveyance, which was approved by them; but they refused to re-deliver up the title deeds unless the bill of costs was paid. One of the charges in the bill was in respect of the re-conveyance; the others arose exclusively from the relation of the mortgagee and the defendants, as client and solicitor. On *assumpsit* by A. to recover back the money so paid—Held, first, that the defendants were not entitled to withhold the deeds from the mortgagor. Secondly, that the mortgagor might maintain this action against the defendants, for money extorted under duress of his goods, and paid by him under protest to the defendants for their own benefit.

Assumpsit for money had and received, and on an account stated. Plea, *non assumpserunt*. At the trial, before Lord Denman, C. J., at the sittings after Easter Term, 1843, it

appeared, that on the 11th January, 1841, the plaintiff borrowed a sum of 350*l.* from a Mr. Wagnell, an attorney, who prepared the mortgage, which was dated as above. In the mortgage-deed, the day fixed for the re-payment of the money was the 10th January, 1842, and there was a power of sale in default of its not being paid after three months' notice, and there was also a proviso for a re-conveyance at the proper costs and charges of the mortgagor. On the 20th July, 1842, the defendant gave the plaintiff a written notice to pay the principal, and all interest, on the 20th October following. Within that time the plaintiff's solicitor sent the defendants a draft re-conveyance. They approved of it, and it was shortly afterwards executed. The plaintiff had employed his own solicitor in the matter. The defendants refused to deliver up the title-deeds unless their bill of costs, amounting to 11*l.* 12*s.* 5*d.*, was paid to them. The plaintiff's attorney objected, but finding that he could not otherwise get the deeds, he paid the amount under protest, and got the following receipt:

"Received of W. H. Wakefield, Esq., the sum of 11*l.* 12*s.* 5*d.* being the amount of our bill annexed.

"London, Dec. 15th, 1842."

At the trial, a non-suit was applied for on the part of the defendants, and *Ogle v. Story* (4 B. & Adol. 735) and *Pratt v. Vizzard* (5 B. & Adol. 808) were referred to. The Chief Justice reserved the point; telling the jury, that in his opinion the plaintiff was entitled to the whole amount, as the defendants had no right to retain the deeds; but directing them to say what they considered a reasonable sum for the plaintiff to have paid for the re-conveyance, and to give him, by their verdict, the difference. A verdict was entered for the plaintiff accordingly for 11*l.* 12*s.* 5*d.*

In the ensuing term, a rule nisi was obtained, in pursuance of the leave reserved, or for reducing the damages, against which, in Easter Term, (April 16),

Knowles and *Miller* shewed cause. In *Ogle v. Story* (4 B. & Adol. 735), the plaintiff had purchased the property subject to a mortgage, and the deeds were at the time in the hands of the attorney of the mortgagee, subject to a lien for

a debt due to him from his client; and the principle, *caveat emptor*, applied. In this case there is no privity of contract between the mortgagor and the attorney. *Pratt v. Vizzard* (5 B. & Adol. 808) is an authority for the plaintiff. The plaintiff was only liable to the charge in respect of the re-conveyance. (*Hollis v. Claridge*, 4 Taunt. 807).

Platt and Butt, in support of the rule.—First, *Hollis v. Claridge* (4 Taunt. 807) and *Pratt v. Vizzard* (5 B. & Adol. 808) proceeded upon the ground, that the party who had placed the deeds in the hands of the attorney had no right to do so. Secondly, if the defendants charged more to the mortgagor than was due, though the money was paid under protest, it cannot be recovered. An action will not lie to recover money paid to release goods from a distress. (*Brown v. M'Kinally*, 1 Esp. 279). The plaintiff should have tendered what he thought due, and brought trover for the deeds. [*Wightman, J.*—Suppose nothing was due.] Money paid under duress of goods cannot be recovered. (*Skeat v. Beale*, 11 Adol. & Ell. 983; 4 Jur. 766). [*Wightman, J.*, referred to *Shaw v. Woodcock*, (7 B. & C. 73). *Patteson, J.*—Here the money sought to be recovered was not paid with knowledge of the facts, but under duress.] That was the case in *Lindon v. Hooper*, (Cowp. 414). [*Patteson, J.*—But the case of a distress has always been excepted.] According to the judgment in *Skeat v. Beale*, (11 Adol. & Ell. 983), there is a difference between duress of goods and menace of the person. [He also cited *Evans v. Elliott*, (5 Adol. & Ell. 142); *Wilson v. Ray*, (10 Adol. & Ell. 82; 2 Jur. 384).] Thirdly, if the plaintiff can recover, it must be against the principal of the defendant, not against the defendant himself. (*Stephens v. Badcock*, 3 B. & Adol. 354; *Bamford v. Shuttleworth*, 11 Adol. & Ell. 926.)

Cur. adv. vult.

In Trinity Term, (May 27),

LORD DENMAN, C. J., delivered the judgment of the court.—This was an action by a mortgagor against the solicitor of a mortgagee, to recover a sum of money which the defendant had exacted from the plaintiff, refusing to deliver his title deeds after conveyance to him of the mortgage property, on payment of principal and interest, unless the plaintiff would

also pay the amount of the defendant's bill of costs. The verdict was taken for 11*l.* 12*s.* 5*d.*, the amount so exacted; but the defendant had leave to move for a non-suit if the court should think the action not maintainable, or for reduction of the damages to 5*l.* if the jury were wrong in not deducting certain items in the bill. One of his charges, viz. 6*l.* 11*s.* 8*d.* was in respect of the re-conveyance; but the other parts of the bill were exclusively due, and arose from the relation of the mortgagee to the defendants, as client and solicitor. We are of opinion the defendant was clearly wrong in withholding the deeds until the sum was paid; for it appears from *Hollis v. Claridge*, (4 Taunt. 807), and is the known practice, that a mortgagee cannot, by handing over deeds to his attorney, create a new lien against the mortgagor in respect of a debt of his own. But an objection to the maintenance of the action was drawn from certain expressions employed by me in a late judgment in this court in the case of *Skeat v. Beale*, (11 Adol. & Ell. 983; 4 Jur. 766): that case was not alluded to in the case of *Parker v. The Great Western Railway Company*, in the Common Pleas, reported in 13 Law Journ. 105; 8 Jur. 194; when that court, in conformity to a late decision, and to some former decisions of this court, laid down the principle, that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received. In considering the case of *Ashmole v. Wainwright*, (2 Q. B. Rep. 837; 6 Jur. 729), we were required to give some attention to the doctrine in *Skeat v. Beale*. It was by no means unsupported by some ancient authority; but perhaps it was laid down in terms too strong and extensive (a). The case itself, however, was there satisfactorily shewn to be distinguished both from *Ashmole v. Wainwright* and from the present case (b). The principle just stated must be taken as well established and generally recognised. It may produce the inconvenience of a circuitry of action, but the evil

(a) See by Coleridge, J., in *Ashmole v. Wainwright*, (6 Jur. 730).

(b) "If my goods have been wrongfully detained, and I pay money simply to obtain them again, that, being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress."—Parke, B., in *Atlee v. Backhouse*.

of allowing extortion by means of a wrongful detention of goods would be a much greater one; the wrongdoer has no right to complain when he is compelled to resign money which he was warned he had no right to extort. The case is wholly different from that where the parties have come to a voluntary settlement of their concerns, and have chosen to pay what they conceive to have been found due. A third defence was raised on the case of *Bamford v. Shuttleworth*, (11 Adol. & Ell. 926), where the purchaser had paid the agreed price of an estate to the vendor's attorney, but was holden to have no right of action against him for the price when the purchase went off for defect of title. But there the attorney received the money merely as agent to his client, to whom alone he was responsible for it; here, the attorney insisted on withholding the deeds for his own benefit, to secure the payment of his own bill. It is a mistake to say that there is no privity between the plaintiff and the defendant. The privity in the original transaction was indeed between the defendant and his client; but when the defendant compelled the plaintiff to part with the money in order to regain possession of his rights, the law created privity between them, and implied a promise to repay what he should appear to have improperly obtained. It follows the verdict must stand for the plaintiff; the damages being reduced to 6*l.* 11*s.* 5*d.*, the difference between the whole sum received by the defendant, and the 5*l.* due from the plaintiff.

Rule for nonsuit discharged.

Rule for reducing damages absolute.

WARWICK *v.* COX.

8 Jurist, 713.

To an action of debt on the common counts, the defendant pleaded, as to part, the general issue, and to the residue, payment after action brought, together with a set-off to the whole. The cause and all matters in difference having been referred to arbitration, the arbitrator awarded that a verdict be entered for the defendant on all the issues except the first; and on that, issue for the plaintiff, without any damages; and that there were no other matters in difference:—Held, first, that the plea of set-off covering the whole cause of action, the finding the general issue without any damages was good; and secondly, that the finding a payment by the defendant, since action brought, of part of the sum claimed, was not inconsistent with finding the set-off in his favor.

Cole moved to set aside an award, with the verdict and judgment signed on it. It was an action of debt for work,

labour, and materials, goods sold, and on an account stated; to which the defendant pleaded, first and second, except as to 35*l.* parcel &c., the general issue, and payment before action brought; third, as to that sum, payment after action brought; fourth, to the whole, a set-off. There was a fifth plea, to which a *nolle prosequi* had been entered. The case having come on for trial, a verdict was taken for the plaintiff, subject to a reference of the cause and all matters in difference; the costs of the cause to abide the event of the reference, and those of the award to be in the discretion of the arbitrator. The arbitrator awarded, "that the verdict for the plaintiff be set aside, and a verdict entered for the defendant on all the issues except the first, and on that issue the verdict be entered for the plaintiff, without any damages. And, as to the matters in difference, I award and determine, that there were none other than the matters in difference in the cause." This award is bad for two reasons: first, having found on the general issue in favour of the plaintiff, the arbitrator was bound to award at least nominal damages. In the case of *Grout v. Glasier*, (1 Dowl. N. S. 58), where, in answer to an action on the case for injury to a house, the defendant pleaded the general issue, a traverse of the plaintiff's right to the house, and payment into court of 5*l.*, with no damages ultra, the jury having found for the plaintiff on the first issue, without assessing any damages, and for the defendant on the last, while they were discharged from giving any verdict on the second, this court held, that on this state of the record, the defendant was entitled to the *postea*, unless the judge who tried the case would amend it by inserting nominal damages; and, in the event of this not being done, there must have been a *venire de novo*. So, in *Clement v. Lewis*, (3 B. & B. 297), where a verdict was found for the plaintiff on two pleas out of eight, without assessing damages, a court of error awarded a *venire de novo*. [He also referred to *Wood v. Duncan*, (7 Dowl. 91).] Secondly, the finding is repugnant. The plea of set-off which is pleaded to the whole, is a complete answer to the plaintiff's demand, shewing that nothing was due to him at the time the action was commenced; the finding which in favour of the defendant is inconsistent with

the finding in his favour on the third plea, of payment since action brought. If, at the commencement of the action, the defendant had a set-off covering the whole cause of action, and there was a payment of a part of the plaintiff's demand since action brought, the arbitrator should have found the balance to be due to the defendant, as he expressly says there were no other matters in difference.

POLLOCK, C. B.—There is no ground for a rule in this case. If at the trial of a cause a plaintiff chooses to take notice of certain of his pleas being bad, and assesses no damages upon them, he may do so; and if it turns out afterwards that those pleas are good, it is no objection on the record, that they were found in his favour, with no damages assessed upon them, if it appears from the rest of the record that there were no damages incurred.

PARKE, B.—I am of the same opinion. The case which has been referred to, of *Grout v. Glasier*, is explained by the report in the Law Journal, vol. 10, N. S., 276 Exch. I am there reported to have said, "As the *postea* now stands, the defendant would be entitled to it. The plaintiff must apply to the judge to amend it, by inserting nominal damages for him; and if this be not done, his only remedy is by a *venire de novo*. If the jury find more trespasses than are answered by the defendant, they ought to find a verdict for the plaintiff, with nominal damages." That is correct, and shews that in that case the sum paid into court did not cover the whole demand in the declaration. "Not having done so, they are guilty of a default, which brings the case within the principle on which a *venire de novo* issues." This clearly goes on the ground that the payment into court did not cover all the trespasses complained of. Then, as to *Clement v. Lewis*, the decision seems quite correct. The jury there were bound to assess the damages as well as try the issues; not having done so, the court had no power to do so for them, and, the pleas being bad, had no alternative but to grant judgment non obstante veredicto. But that is not the case here, for the pleas here are good, and shew a complete answer to the whole cause of action; so that to assess damages would have been quite idle. Then, with respect to the second question, I see

no necessary repugnancy in the findings on these issues. An action is brought to recover a certain sum, a portion of which is paid after the action is commenced, but the defendant at the time the action was brought had a set-off equal to the amount of the whole claim. What inconsistency is there in the arbitrator finding that state of facts? It is said, that if so, there must have been other matters in difference between the parties; but that does not follow, because the payment of the smaller sum may have been made after plea pleaded, and before the order of reference.

ALDERSON, B.—The defendant may have had a demand exceeding the 35*l.*, and given up his claim to the balance. We ought to make every intendment in favour of an award.

ROLFE, B., concurring.

Rule refused.

WHITMORE v. GREEN.

8 Jurist, 697.

A sheriff, who, having seized goods under a *Fieri Facias*, sells them after notice to the execution creditor of an act of bankruptcy committed previous to the seizure, no fiat having been issued until after the sale, is not liable to be sued in trover. Even supposing the sheriff a wrongdoer in such a case, the execution creditor would not be liable in trover, though he took part of the proceeds of the sale out of court under a judge's order. Semble, he would be liable in an action for money had and received. The defence, that the goods were seized under such circumstances, need not be specially pleaded.

Trover by the assignees of a bankrupt, laying the conversion in their own time. Pleas: the general issue and a traverse of the plaintiffs' possession. At the trial, before the late Lord Abinger, it appeared that this was an action brought by the plaintiffs, as assignees of one Lawton, a bankrupt, against the sheriff of Cambridgeshire, who had seized some property of the bankrupt under a writ of *fieri facias* issued by Cottenham, the other defendant, under the following circumstances:—On the 22d May, 1843, a warrant of attorney for 15*l.* 15*s.* 6*d.*, and without defeasance, was given by Lawton to the defendant Cottenham, who signed judgment, and sued out a *fieri facias* thereon. This writ was delivered to the sheriff of Cambridgeshire in the afternoon of 26th May, who immediately issued a warrant, which reached the hands of his officer in the country at 9 o'clock the next morning, who on the same day seized the goods which formed the subject of

the present action as the goods of Lawton. It appeared, however, that on the morning of the 26th May, Lawton committed an act of bankruptcy, by executing a bill of sale for the benefit of his creditors, of which the defendant Cottenham and the sheriff had no notice until after the seizure. The goods seized remained in the hands of the officer until the 8th and 9th June, when they were sold; subsequent to which, on the 21st July, a fiat in bankruptcy was issued against Lawton, in respect of the act of bankruptcy on the 26th May, nor was there any other act of bankruptcy committed by him. It also appeared, that after the sale, and before the fiat, an interpleader order had been obtained, to which the execution creditor and trustees under the deed of assignment were parties, whereby part of the proceeds of the sale were directed to be paid into court, and an issue tried to determine the property in the goods. The trustees not having proceeded to the trial of this issue within the limited time, another order was made to allow the execution creditor to take out of court the amount paid in, which was done accordingly. On this state of facts, several objections to the right of the plaintiffs to recover having been raised on the part of the different defendants, a verdict was entered for the plaintiffs for the amount levied, with leave reserved to the defendants to move to enter a verdict or a nonsuit.

In Easter Term, (April 20),

Byles, Serjt., moved on the part of the sheriff.—First, on the facts proved at the trial, the sheriff is not liable in trover: (6 Geo. IV, c. 16, ss. 81 and 108; 2 & 3 Vict. c. 29; *Godson v. Sanctuary*, 4 B. & Adol. 255; 1 Nev. & M. 52; *Whitmore v. Robertson*, 8 Mee. & W. 463; 5 Jur. 1088; *Ramsay v. Eaton*, 10 Mee. & W. 22; and *Skey v. Carter*, 11 Mee. & W. 571; 7 Jur. 427). Secondly, even supposing the sheriff liable, trover is not the correct form of action, as the sheriff at the time he seized the goods was acting in the strict discharge of his duty. [*Parke*, B.—The sheriff sold the goods after notice of the act of bankruptcy; and we have recently decided, in *Cheston v. Gibbs*, (7 Jur. 1160), that trover will lie in such a case.] In that case the fiat issued before the sale. [*Parke*, B.—That makes no difference in principle.]

POLLOCK, C. B.—On the first point you may take a rule.

Peacock then moved for a similar rule on the part of the execution creditor, and also on the ground, that, assuming the sheriff not protected, there was nothing to render the party suing out the execution liable in trover. Not having ordered the sheriff to do the act, he could only be liable in an action for money had and received. [He cited *Page v. Wiple*, (3 East, 314).]

The Court granted the rule on both points.

Watson and Bovill (April 27 and 30) shewed cause.—The main question in this case, namely, the right of the assignees to sue at all, turns on the construction of the stats. 6 Geo. IV. c. 16, and the 2 & 3 Vict. c. 29. By the 108th section of the former act, it is enacted, that “no creditor having security for his debt, or having made any attachment in London or any other place, by virtue of any custom there used, of the goods and chattels of a bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of, or lien upon, any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors.” The true construction of this section, standing alone, seems to be, that where the execution is on an ordinary judgment, or a judgment consequent upon a verdict, a seizure before the act of bankruptcy is protected, and the plaintiff may go on to complete the execution by sale; but where the judgment is on a warrant of attorney, and the seizure is before the act of bankruptcy, and the goods remain unsold, the assignees become entitled to the goods by relation to the time of the act of bankruptcy. *Wymer v. Kemble*, 6 B. & C. 79; *Godson v. Sanctuary*, 4 B. & Adol. 255; 1 Nev. & M. 52). The first question then is, is this section affected by the 2 & 3 Vict. c. 29, which enacts, that “all executions and attachments against the lands and tenements, or goods and chattels, of a bankrupt, bona fide

executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding an act of bankruptcy by such bankrupt committed; provided the person or persons, at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of executing and levying such execution or attachment, notice of any prior act of bankruptcy by him committed." It is submitted that it is wholly untouched by it. It was not the intention of the latter statute to disturb the general relation of the title of the assignees to the act of bankruptcy; its only object was to give effect to certain executions, which would otherwise have been invalid. The decisions in *Whitmore v. Robertson* and *Skey v. Carter* seem to shew this; and although *Ramsey v. Eaton* points to a contrary conclusion, the decision in that case seems doubtful. But even supposing the 108th section of the 6 Geo. IV. c. 16, to be affected in any degree by the statute 2 & 3 Vict. 29, it is at most only repealed sub modo; and *Whitmore v. Robertson* and *Skey v. Carter* clearly shew, that where the judgment is on a warrant of attorney, there must be both a seizure and sale in order to avoid the title of the assignees; and notice of an act of bankruptcy is equivalent to an act of bankruptcy pending the execution. But, thirdly, supposing the defence set up in this case to be an answer to the action, it should have been specially pleaded in justification. [Parke, B.—We held, in the case of *Unwin v. St. Quentin*, (11 Mee. & W. 277), that such a defence could be given in evidence under one or other of the pleas of the general issue, or not possessed. In the case of *Stancliffe v. Hardwick*, (2 C. M. & R. 1), we laid down, that since the new rules, the conversion put in issue by the plea of not guilty was a conversion in fact and that it made no difference that the act was done with a lawful excuse, which, if it existed, ought to be specially pleaded. There is, however, an argument of my brother Maule, which is unfortunately not reported, where he questioned the correctness of that doctrine. It considerably shook my faith in that decision, which I now think proceeded under a wrong impression: If, therefore, the taking in the present case were a lawful act, it is not a conversion, and the question comes to this; the defendants have pleaded not guilty and not

possessed—the effect of the 2 & 3 Vict. c. 29, is either to prevent the relation back of the title of the assignees to the time of the act of bankruptcy, or, if not to destroy that relation altogether, at least to give the parties a right to seize the goods, and obtain payment of the debt out of them. If this latter be the correct view, not possessed would not be a good plea, but not guilty would; because every thing done by the sheriff would be a legal act, and no conversion. But certainly the justification under this clause in the statute is admissible under one or other of those pleas.] The last point made in this case is, that even supposing the sheriff to be liable, the execution creditor is not. Conceding that an execution creditor may not in the first instance be liable for the acts of the sheriff, he may render himself so by ratifying or assenting to them; (*Rush v. Baker*, 2 Str. 996; B. N. P. 41; *Menham v. Edmonson*, B. & P. 369; *Balme v. Hutton*, 2 C. & J. 19; 2 C. & M. 262); and the conduct of the execution creditor here, in allowing the sale to go on and receiving the proceeds after he had notice of an act of bankruptcy, amounts to an affirmation of the acts of the sheriff. Besides, *Cheston v. Gibbs* seems to shew, that in the case of an execution against the goods of a bankrupt, the execution creditor would be liable with the sheriff in any event. [*Parke*, B.—No doubt the execution creditor may render himself liable by ratifying the act of the sheriff in seizing the goods for him. This clearly appears from the case of *Wilson v. Tummon*, (12 L. J., N. S., C. P., 306). But the sheriff, in paying this money into court, was the officer of the court, not the agent of the party; and the receiving the money under a rule of court is not a ratifying of the acts of the sheriff.]

Byles, Serjt., and *Cleasby*, in support of the rule on the part of the sheriff.—The stat. 2 & 3 Vict. c. 29, was a substitute for the 81st section of the 6 Geo. IV, c. 16, with which it is identical in all respects except not requiring that the execution be executed and levied within two calendar months before the issuing the fiat; and the whole question turns on the meaning of the words “executed and levied” in these enactments. *Godson v. Sanctuary* is an express authority that the execution is completed by seizure; and the exception sought

to be established with respect to judgments founded on warrants of attorney is without foundation. Even supposing, as contended for on the other side, the 108th section of the 6 Geo. IV, c. 16, to be unaffected by the stat. 2 & 3 Vict. c. 29, there is no authority for the position that an execution will be invalidated by an act of bankruptcy between the seizure and sale but it is submitted that that section is qualified by the stat. Victoria, all the cases on which treat the sale and not the act of bankruptcy as the dividing line between the protected and not protected execution. It would be hard to hold parties concluded by a notice which may be true or false.

Peacock, for the execution creditor.

Cur. adv. vult.

The judgment of the court was now delivered by

ALDERSON, B.—In this case, the assignees of a bankrupt brought an action of trover against the sheriff of Cambridgeshire, and an execution creditor, at whose suit some goods belonging to the bankrupt had been seized. The defendants pleaded the general issue, and that the plaintiffs, as assignees, were not possessed of the goods in question. It appears, that the goods had been seized in execution under a warrant of attorney, dated on the 22nd May, 1843, and were sold on the 8th and 9th July; subsequent to which, and within two months after giving the warrant of attorney, a fiat in bankruptcy was issued against the party who gave it. But between the seizure and sale the execution creditor and the sheriff had notice of an act of bankruptcy subsequent to the granting the warrant of attorney. Under these circumstances, a verdict was entered for the plaintiffs, with leave reserved to the defendants to move the court above on two points; first, on the part of the execution creditor, that although he might be liable in an action for money had and received, he was not liable in trover as a wrongdoer; and secondly, on the part of both defendants, that on the true construction of the 6 Geo. IV. c. 16, and 2 & 3 Vict. c. 29, no action at all would lie under the circumstances. On the first point, we think that this rule must be made absolute. It does not appear, from the evidence, that the execution creditor intended to meddle with the execution of the writ. He only put it into

the hands of the sheriff, and subsequently received the money levied; and to hold him liable in trover, would be to render him accountable not only for the proceeds of the sale, but for the entire value of the goods taken under the levy. No authority can be found to support such a proposition. The cases cited at the bar, of *Menham v. Edmonson*, (1 B. & P. 369), and the other from B. N. P. 41, differ from this. The ground on which the execution creditor was deemed liable in the latter case was, his having given a bond to secure the sheriff; and, in the former, that he was present at the time of the execution. But, in the present case, there has been no interference by the execution creditor; and, consequently, although he may be liable to refund the money received by him, he is not liable in trover. The case of the sheriff, however, is very different. In the case of *Balme v. Hutton*, (1 C. & M. 262), it was held, that a sheriff, who, under a fieri facias, seized the goods of a bankrupt before the commission or fiat, but after an act of bankruptcy, though without notice of the bankruptcy, is liable in trover; so that the sheriff in this case would be liable, unless that is altered by the subsequent statutes and decisions. Now, in the case of *Cheston v. Gibbs*, (7 Jur. 1160), it was decided, that, where the sale is after a fiat, the sheriff is liable in trover; and the question, therefore, is, whether it makes any difference, that the sale was before the fiat, but after the act of bankruptcy and notice to the execution creditor. And we are of opinion, that the execution of the writ in such a case is not affected by the act of bankruptcy, so as to render him a wrongdoer. It was decided by this court, in *Whitmore v. Robertson*, (8 Mee. & W. 463: 5 Jur. 1088), and by the Exchequer Chamber, in *Skey v. Carter*, (11 Mee. & W. 571; 7 Jur. 427), that the 108th section of the 6 Geo. IV, c. 16, is not repealed by the stat. 2 & 3 Vict. c. 29, and that an execution on a warrant of attorney, in which there had been only a seizure, and not completed by sale, was not within the protection of the 2 & 3 Vict. c. 29; and the actual sale is also made the dividing point in the case of *Wymer v. Kemble*, (6 B. & C. 479). The question, therefore, here is, is the sheriff a wrongdoer from having seized goods after the act of bankruptcy, but before

notice to the execution creditor, and the sale having taken place after that notice, and before the fiat? This depends on the construction of the 2 & 3 Vict. c. 29. The judges who delivered the opinion of the court in *Whitmore v. Robertson* and *Skey v. Carter*, have decided, that the 108th section of the 6 Geo. IV. c. 16, is not repealed by the statute of Victoria, but that this latter statute is a substitute for the 81st section of the former act. Reading, then, these two statutes together, the result is, that it appears that all such executions on judgments entered up on warrants of attorney to confess judgment as are executed by seizure after the act of bankruptcy, and before the fiat, are rendered valid, so far as they might otherwise have been affected by a secret act of bankruptcy committed before the seizure. The effect of the priority of the act of bankruptcy is done away with, although still sufficient to support the commission or fiat. The question in each case is, whether the execution were such, which, but for the fiat, would have had priority. If the fiat were *previous* to the sale, the execution becomes inoperative, because the party was still a creditor having security for his debt, who accordingly comes within the 108th section of the 6 Geo. IV. c. 16, and is only to be paid rateably with the other creditors. If the fiat comes *after* the sale, he is no longer a creditor having security for his debt, and is entitled to a priority for his execution. In the present case the sale is before the fiat, and consequently, the execution creditor is entitled to the benefit of the statute, unless the fact of notice of the act of bankruptcy having been given before the sale makes any difference in this respect. The intention of the 2 & 3 Vict. c. 29, was, that the prior act of bankruptcy should have no effect on the execution, provided the execution creditor had no notice of it at the time of the seizure; and the execution creditor in this case is in that condition, and to hold him affected by the act of bankruptcy would be to substitute in the statute different words from those contained in it. It was argued before us, on the part of the plaintiffs, that as the execution plaintiff had notice of the act of bankruptcy before the sale took place, it was equivalent to notice before execution levied and executed within the words of the statute; and certainly, if this construction of the statute

be the correct one, the argument might prevail. But when we consider the grounds of the judgment of the court in *Skey v. Carter*, the argument cannot be supported. In the second place, it was argued on the part of the plaintiffs in this case, that as the 108th section of the 6 Geo. IV. c. 16, is not repealed by the stat. 2 & 3 Vict. c. 29, the execution on a warrant of attorney is unaffected by the latter statute, and is in the same situation as if the statute had never passed; so that the execution would be altogether inoperative, where the sale takes place after the act of bankruptcy, and whether notice were given to the execution creditor or not, just as it would have done under the 108th section of the former statute. This argument, however, cannot be sustained consistently with the reasons given both by this court and the court of error in the respective cases of *Whitmore v. Robertson*, *Skey v. Carter*, and *Ramsay v. Eaton*, nor with those of the Court of Queen's Bench in *Godson v. Sanctuary*, in which a judgment on a warrant of attorney was held to be within the protection of the 81st section of the 6 Geo. IV. c. 16, where the seizure took place before the act of bankruptcy, and more than two months before the issuing of the fiat. We therefore think, that the sheriff was not a wrongdoer in this case, and that this rule must be made absolute.

Rule absolute.

IN RE RICHARDS AND OTHERS.

8 Jurist, 752.

Where a justice has committed a prisoner upon an insufficient warrant, and has afterwards substituted a good warrant for it, this court will not, on a return to a habeas corpus, look at the former warrant.

Joseph Richards and John Bird, and James Walker and William Bird, being in the custody of the keeper of the house of correction for the county of Leicester, a writ of habeas corpus was obtained to bring up their respective bodies, &c. The keeper returned, that Joseph Richards and John Bird were committed by the following warrant of commitment:—

“Leicestershire, } To the constable of Worthington, in the
to wit, } said county, and to the keeper of the
house of correction at Leicester, in the said county.—Whereas
information and complainthath been made before me, William

Wooton Abney, Esquire, one of her Majesty's justices of the peace in and for the said county, by Benjamin Walker, of Worthington in the said county, coal master, upon the oath of the said Benjamin Walker, against Joseph Richards and John Bird, late of Worthington aforesaid, in the said county, colliers to the said Benjamin Walker, at his Smoile colliery; that they the said Joseph Richards and John Bird have in their said service severally been guilty of a certain misconduct, misdemeanor, miscarriage, and ill-behaviour towards him the said Benjamin Walker, in that they the said Joseph Richards and John Bird, having severally entered into their said service, have severally therein not fulfilled their contract, by having, at the township of Worthington, in the said county, on the 4th day of April instant, severally neglected their work in such service, contrary to the statute. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and upon due consideration had thereof, have adjudged and determined that they the said Joseph Richards and John Bird have, in their said service, been guilty of a certain misconduct, misdemeanor, miscarriage, and ill-behaviour towards the same Benjamin Walker, in that they, the said Joseph Richards and John Bird, having severally entered into their said service, have severally therein not fulfilled their said contract, by having, at the township of Worthington, in the said county, on the 4th day of April instant, severally neglected their work in such service, contrary to the statute. And I do therefore convict them, the said Joseph Richards and John Bird, of the said offence, in pursuance of the statute in that case made and provided. These are therefore to command you, the said constable, forthwith to convey the said Joseph Richards and John Bird to the said house of correction at Leicester aforesaid, and to deliver them to the keeper thereof, together with this warrant. And I do hereby command you, the said keeper, to receive the said Joseph Richards and John Bird into your custody in the said house of correction, there to remain and severally be kept to hard labour for the space of three months from the date hereof.

And for your so doing, &c. Given under my hand and seal, the 8th day of April, in the year of our Lord, 1844.

“(Signed) William Wootton Abney.”

The keeper also returned, that James Walker and William Bird were committed under a similar warrant; and further, that whilst the said Joseph Richards, John Bird, James Walker, and William Bird, were respectively so in his custody, on the 15th April, 1844, the said William Wootton Abney caused to be delivered to him a certain other warrant of commitment, as follows:—

“Leicestershire, } To all and every the constables and others
to wit, } officers of the peace for the said county,
whom these may concern, and to the keeper of the house of correction at Leicester, in the said county. These are, in her Majesty’s name, to command you, and every of you, the said officers, forthwith safely to convey and deliver into the custody of the said keeper, the body of Joseph Richards, late of Worthington, in the said county, collier, being convicted before me, William Wootton Abney, Esquire, one of her Majesty’s justices of the peace in and for the said county, upon the evidence on oath of Mr. Benjamin Walker, of Coleorton, in the said county, for that he the said Joseph Richards did contract with the said Benjamin Walker, to serve him in the capacity of a collier, for an indefinite period, determinable nevertheless on either of the said contracting parties giving to the other fourteen days’ previous notice of his intention to determine the said contract, and that the said Joseph Richards, did enter into the service of the said Benjamin Walker, did continue to serve him the said Benjamin Walker, and to be employed by him as a collier under and according to the said contract, at the township of Worthington, in the said county of Leicester, so being then and there in the service of him the said Benjamin Walker, as a collier, until the 4th day of April instant; and the term of the said contract being then subsisting and incomplete, he the said Joseph Richards did misconduct and misdemean himself in his said service, to wit, did neglect his work, and refuse to go to it on being requested by the said Benjamin Walker so to do, whereby divers other persons employed in

the said pit were prevented from proceeding with their ordinary employment; and the said Benjamin Walker sustained great damage and loss, contrary to the form of the statute in such case made and provided: for which said offences I, the said justice, have ordered and adjudged the said Joseph Richards to be imprisoned in the house of correction at Leicester, in and for the said county, and there kept to hard labour for the space of three months. And you the said keeper, are hereby required to receive the said Joseph Richards into your said prison, and him safely there to keep for the aforesaid term of three months, and during that term to be kept to hard labour. And for your so doing, &c. Given, &c., this 8th day of April, in the year of our Lord 1844.

“(Signed) William Wooton Abney.”

It further appeared, by the return, that there were three similar warrants of committment of the other three prisoners, and that the prisoners in the two sets of warrants were the same persons.

Bodkin, Fry and Huddleston now moved that the prisoners be discharged. There are here two sets of warrants of commitments. The two warrants of the first set are bad; then can the four warrants of the last set, which recite a conviction, be substituted for them? The proper course would have been to withdraw the former warrants, and explain the circumstances; (*In the matter of Elmy and Sawyer*, 1 Adol. & Ell. 843); but here the keeper of the house of correction has returned all. Then it must be assumed, that the first set of warrants are the convictions, and the latter set the commitments. (*Rogers v. Jones*, 3 B. & C. 409). At any rate the latter warrants are bad. It does not appear that the justice was acting in the county. There is no time or place alleged where the refusal to work took place. It is not shewn that this contract is within the act of Parliament; (*Lancaster v. Greaves*, 9 B. & C. 628); nor is the nature of the service stated.

Whitehurst, contra—The latter set of warrants are sufficient. It is stated that the justice was acting in and for the county, which is the same form as in an order of removal; and no greater strictness is required. A sufficient contract is set out,

with an allegation of time and place. It is contended on the other side that there is nothing here to connect one set of warrants with the other. In *In the matter of Elmy and Sawyer*, it was not decided that one warrant could not be substituted for another; but that it did not appear in that case that the latter warrant was intended by the justice to be in lieu of the former, or to operate as an amendment of it, power to substitute one warrant for another being given by the stat. 3 & 4 Will. IV. c. 43. The court have no right to assume that the latter set of warrants treat the former set as convictions. If there is one good warrant authorising the detention of a prisoner, that is sufficient.

LORD DENMAN, C. J.—We are with you as to the latter set of warrants; if they are good, the court cannot look at the former documents.

PATTESON, J.—The act of parliament does not require that there should be a conviction separate from the commitment; but I take it that there should be something in the nature of a judgment in the commitment.

WILLIAMS, J., concurred.

The prisoners were remanded.

GOUGH v. MILLER.

8 Jurist, 758.

1. Though a witness may not have been called in court on his subpœna, yet, if it clearly appear from the affidavits in support of the application for an attachment against him that he did not attend the trial, the court will make the rule for the attachment absolute. 2. A witness being served with a subpœna, did not object to the amount of the conduct-money, but offered to bear his own expenses. Not having attended the trial, a rule nisi for an attachment against him having been granted—Held, that as he made no objection to the amount of the conduct-money when the subpœna was served on him, it was not competent to him to avail himself of the insufficiency of the amount tendered as an answer to a rule nisi for an attachment. 3. A master maltster, resident at a distance from his malt-house, placed his servant in charge of malt in process of manufacture, strictly enjoining him not to leave it at any time whatever. The servant having been subpœnaed as a witness—Held, that the injunctions of the master afforded no sufficient excuse for disobeying the subpœna, although it was served upon him so short a time before the trial as to preclude the possibility of his communicating with his master.

F. Robinson had obtained a rule nisi for an attachment against one John Devereux, for disobeying his subpœna in this cause, upon affidavits which stated, that the writ of trial issued on the 15th February, for a trial before the sheriff of Norwich; that Devereux was subpœnaed as a witness on the

13th, when 1s. was tendered him as conduct-money; that on the 14th the subpoena was again served, and a sum of 1l. tendered for his expenses, which he refused, declaring he would pay his own expenses; that the trial was called on as was fixed, when, Devereux not appearing, the plaintiff's attorney caused him to be called on his subpoena by an officer of the court, but that, not answering, nor appearing, nor being in attendance, he was obliged to withdraw the writ of trial. The affidavits of Devereux, in answer to the rule, stated that he was in the service of one Dowson, a large maltster; that, on the 13th February, he had been left by his master in care of a malt-house, at a place called Oulton, twenty-six miles from Norwich, containing a large parcel of green malt; that he was ordered by his master to watch this malt perpetually, and not to leave the premises on any account. The affidavit went on to state, that, if the deponent had left the malt, the property would have been damaged, and that he stated this to the person serving him with the subpoena, and that he could not in consequence attend the trial without his master's consent. It appeared from the affidavit, that the person serving him with the subpoena had obtained the consent of his master's clerk, but the deponent swore that he did not consider this sufficient, and omitted to attend. Devereux, it appeared, generally resided at Beccles, eighteen miles from Norwich, but Oulton, where he was in charge of the malt, was twenty-six miles from Norwich.

Palmer shewed cause.—The affidavits on which this rule was obtained are defective. They do not shew that the subpoena was served within a reasonable time; neither do they shew that the conduct-money was paid or tendered. The subpoena was incompletely served on the 13th February, for only 1s. was tendered, and, taking it *argumentati gratia* that the 14th was not too late to compel attendance at a distance of twenty-six miles, there was even then no payment of a viaticum. The case of *Horn v. Smith* (6 Taunt. 10) decides not only that the expenses of a witness must be paid but that they must be paid a reasonable time before the trial. Here the expenses were not tendered a reasonable time before the trial, nor were they paid at all. Conceding, however, that

the tender was made at a reasonable time, the sum tendered was 1*l.* plainly insufficient to travel twenty-six miles, going and returning. In order to succeed in such an application as this, it must appear that the party was called on his subpoena in court. In *Re Jacob* (1 H. & W. 124); *Rex v. Solomon*, (1 Dowl. P. C.; O.S., 145); *Malcolm v. Ray*, (3 Moore, 223); *Rex v. Fenn*, (3 Dowl. P.C., O. S., 546), it was indispensable, and laid down in all works of practice, that a party should be called on his subpoena in due form in order to found a proceeding for attachment. [*Wightman, J.*—He was called on his subpoena, and that was in due form.] He may have been in court and have been called outside. The affidavits are also defective, in that they do not expressly swear that 20*s.* was a sum sufficient for conduct-money. [*Wightman, J.*—But you were ready to pay your own expenses.] The affidavits in opposition to the rule afford an answer on the merits. Devereux was the mere servant of a Maltster, and bound to obey his lawful commands. The care of the malt under a particular process devolved on him, and it was indispensable to the safety of this property that he should remain on the spot with it. His absence, even for a short time, might have caused great damage to, or a total loss of, the malt, and hence it was that he was rigorously enjoined by his master not to leave his charge. How, then, could he leave without risking the merchandise or his situation, or both? It was impossible to think that any contempt was committed, or any disrespect shewn to the process of the court. Here, there was no time to obtain permission from the principal to go, or rather a removal of the injunction not to move from the malt; and although it is stated that a clerk gave permission, yet such permission should not excuse Devereux in the eye of his master in disobeying his commands.

F. Robinson, in support of the rule.—*Dixon v. Lee*, (1 C. M. & R. 646) overrules *Malcolm v. Ray*, (3 Moore, 222). Mr. Baron Park there observes, in reference to *Malcolm v. Ray*, “Since the case of *Barrow v. Humphreys*, (3 A & Ald. 598), that case cannot be quoted as an authority.” What is the meaning of calling in due form? [*Wightman, J.*—You have

omitted the words "in court." Is it necessary that he should be called in court, in order to subject the party to attachment?] It need not be admitted that the calling in court is necessary for the foundation of the proceeding is the disobedience to the order of the court by not appearing. [*Wightman, J.*—That is where the court calls on him to answer.] To call a person who was twenty-six miles off would indeed be idle. The calling of a witness in court is a mere convenient custom or ceremony, and *Rex. v. Stretch* (3 Adol. & Ell. 503) shews it to be nothing more. [*Wightman, J.*—If it is not necessary to call him in court, you need not trouble yourself further: if it is, your affidavit does not shew it has been done. *Palmer.*—In *Lush's Practice* it is said to be advisable, and *Rex. v. Fenn* is cited.] In *Dixon v. Lee* Mr. Baron Alderson says, "There may be a distinction between the case of a witness who does attend, and a witness who does not attend, in pursuance of the subpoena. In the one case it might be of use to call him; in the other there can be no object in doing so." It is not sworn on the other side, that he was not called in due form. The only object in having him called is to satisfy the mind of the court that he is absent; but that is not the only means of satisfying the court, and here the party admits he never went to Norwich according to the exigency of the subpoena. Mr. Justice Best, in *Barrow v. Humphreys*, states this to be the rule, and *Lamont v. Cooke* (6 Mee. and W. 615) is to the same effect. [*Wightman, J.*—That was the cause of an action, which is a different thing.] It is submitted that there is no distinction between what is necessary to support an action and what is necessary to support an application for an attachment. [*Wightman, J.*—*Barrow, v. Humphreys* is most in your favour.] As to a sufficient amount of conduct-money not having been tendered, that objection ought to have been raised, according to *Dixon v. Lee* (1 C. M. & R. 647), at the time the subpoena was delivered, and it is not now competent to the party to raise an objection which he formerly waived. The circumstances stated in the affidavit of Devereux afford no excuse whatever. It is not sworn that he could not have reached Norwich in time, nor is it stated that he could not have found

somebody to fill his place when absent. As he has chosen to obey the maltster, and to disobey the Queen's Bench, the court will make the rule absolute for the attachment.

Cur. adv. vult.

WIGHTMAN, J., subsequently delivered judgment.—This was an application for an attachment against John Devereux, for not attending as a witness on the trial of a cause before the sheriff of Norwich, on the 15th February last. It appeared that the subpoena was incompletely served on the 13th February, by a person who tendered Devereux 1s. conduct-money, but that on the following day 1l. was tendered to him at Oulton, twenty-six miles from Norwich, which he refused to accept, saying he would pay his own expenses. He did not, however, appear on the writ of subpoena, and the plaintiff's attorney was obliged to withdraw the record. In answer to the rule, it is sworn that Devereux was a servant in the employ of a large maltster; that he was left in charge of a quantity of green malt, with explicit directions from his master not to leave the malt at any time whatever; that he could not communicate with his master, and that he was not offered sufficient conduct-money. It is contended that these circumstances disentitle the plaintiff to proceed by attachment, inasmuch as it is not stated that the witness against whom this application was made was called in court. But I do not think that it was at all necessary that he should have been so called. Mr. Justice Best, in *Barrow v. Humphreys*, observes, "The calling of the witness upon the subpoena is only for the purpose of obtaining clear evidence of his having neglected to appear; but that is not necessary if it can be clearly shewn by other means that the party has disobeyed the orders of the court." In *Dixon v. Lee*, cited at the bar, the authority of that decision is fully recognised; and in the present case it is not denied, indeed it is admitted, that the witness did not attend. The first objection urged consequently fails. As to the second, taken on the ground of the insufficiency of the sum tendered, I think witness cannot now insist on an objection which he expressly waived at the time, by expressing his intention to pay his own expenses. It is further said, that the party was but a servant, acting under the lawful commands of his master,

and that he had, therefore, a reasonable and proper excuse for his absence. I do not see that he had any such excuse. The duty of attending a court of justice to give evidence, is a duty of the very highest kind and gravest obligation, and is paramount to any command of any master, no matter how positive, express, or explicit. There was no impossibility in the witness's attending; and, as he had sufficient time to attend, the rule for an attachment against him must be made absolute.

Rule absolute.

THE UPPER CANADA JURIST.

CASES IN THE ENGLISH COURTS.

LYON v. REED.

8 Jurist, 762.

In order to constitute the surrender of a particular estate by act and operation of law, the owner of the particular estate must be a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid, if his particular estate had continued to exist. In all such cases, the law attaches to the act done the legal consequences of a surrender, independent of any intention in the parties to surrender the particular estate, or even in spite of an express intention to keep it unsurrendered; but

The mere consent of the owner of a particular estate to an act done by the reversioner is insufficient; at least in case of such things as pass by deed; Quære, whether not also in matters which lie in livery, contrary to the doctrine laid down in *Thomas v. Cook* (2 Stark. 408; 2 B. & A. 119); *Stone v. Whiting*, (2 Stark. 235); *Walker v. Richardson*, (2 Mee. & W. 882), &c.?

The acts in pais, which operate by way of estoppel, anciently were, and in contemplation of law have always continued to be, acts of notoriety, less formal and solemn than the execution of a deed, but the concurrence of the parties to which there could from that notoriety be no difficulty in ascertaining.

The principle regulating the presuming documents in support of beneficial enjoyment is, that where there has been a long enjoyment of any right which could have had no lawful origin except by deed, there, in favour of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption.

The nature of this case fully appears from the judgment, which was now delivered by

PARKE, B.—This was a special case, argued in Easter Term. It was an action of debt by the plaintiff, as assignee of the reversion of certain houses and rope-walks at Shadwell, holden under a lease from the Dean of St. Paul's, against the defendants, who are executors of Shakespeare Reed, deceased. The plaintiff claims from the defendants nineteen years of rent, accrued due between Christmas, 1820, and Christmas, 1839, partly in the lifetime of Shakespeare Reed, who held the premises during his life, and partly since his decease, while the premises were in the possession of the defendants, his executors. The material facts are as follow:—The premises in question are parcel of the possessions of the Dean of St. Paul's; and it appears, that on the 26th December, 1803,

the then dean demised a large estate at Shadwell, including the house and premises in question, to two persons of the names of Ord and Planta (and who were in fact trustees for the Bowes family), for a term of forty years, commencing at Christmas, 1803, and which would, therefore, expire at Christmas, 1843. On the 24th March, 1808, Ord and Planta made an underlease of the houses and rope-walks in question to Shakespeare Reed, for thirty-four years, commencing from Christmas, 1807; so that the term created by this underlease would expire at Christmas, 1841, leaving a reversion of two years in Ord and Planta. The rent sought to be recovered is the rent accrued due on the underlease between Christmas, 1820, and Christmas, 1839. It appears that previously to the month of October, 1811, Robert Hartshaw Barber and Francis Charles Parry were appointed by the Court of Chancery trustees for the Bowes family, in the place of Ord and Planta; and by an indenture dated the 3rd October, 1811, endorsed on the lease of 1803, all the property at Shadwell demised by that lease was assigned by Ord and Planta to Barber and Parry, the new trustees. Soon after this assignment the Bowes family appear to have negotiated with the dean for a renewal of the lease of 1803; and accordingly a new lease was executed by the dean, dated the 7th April, 1812, for a term of forty years from Christmas, 1811, and which term would therefore endure till Christmas, 1851. Unfortunately, this lease, instead of being made to Barber and Parry, the new trustees, in whom the old term (subject to the underlease to Reed) was vested, was made to Ord and Planta, the old trustees; the fact of the change of trustees, and the assignment of the 3rd October, 1811, having at the time escaped observation. In this state of things, a private act of Parliament was passed, enabling the dean and his successors for the time being to grant leases of the Shadwell estate to the trustees of the Bowes family, for successive terms of ninety-nine years, renewable for ever. The act, which is intitled "An act to enable the Dean of St. Paul's, London, to grant a lease of messuages, tenements, lands and hereditaments in the parish of St. Paul, Shadwell, in the county of Middlesex, and to enable the lessees to grant sub-leases for building on, and

repairing that estate," received the royal assent on the 22nd July, 1812. It begins by reciting the will of Mary Bowes, whereby she bequeathed her leasehold estate at Shadwell, held under the Dean of St. Paul's (being the estate afterwards demised by the leases of 26th December, 1803, and the 7th April, 1812), to Ord and Planta, on certain trusts, for the Bowes family. It then recites the lease of the 7th April, 1812, and after stating that it would, for the reasons therein mentioned, be beneficial for all parties that the dean should be empowered to grant long leases of the Shadwell property, perpetually renewable, and further stating that Ord and Planta were desirous of being discharged from their trust, and that John Osborn and John Burt had agreed to act as trustees in their place, it enacted, that it should be lawful for the dean and his successors for the time being, and he and they are thereby *required*, on a surrender of the existing lease, to demise the Shadwell estate to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years, and, at the end of every fifty years, to grant a new lease, on payment of a nominal fine, with various provisions (not necessary to be stated) for securing to the dean and his successors a proportion of all improved rents to be thereafter obtained. And by the second section of the act it is enacted, that, immediately on the execution by the dean of the first lease for ninety-nine years to be granted in pursuance of the act, the lease of the 7th April, 1812, should become void. It is plain, from the provisions contained in this act, that the persons by whom it was obtained were not aware, or had forgotten, that in the month of October preceding Ord and Planta had assigned their interests in the property to Barber and Parry, the new trustees appointed by the Court of Chancery. In pursuance of the act of Parliament, by an indenture of three parts, dated the 31st August, 1812, and made between the dean of the first part, Thomas Bowes (the party beneficially interested for his life) of the second part, and Osborn and Burt of the third part, the dean demised the Shadwell property to Osborn and Burt, for a term of ninety-nine years; and the demise is expressed to be made as well in consideration of the surrender of the lease of the 7th April,

1812, "*being the lease last existing*," as also of the rents and covenants, &c. Mr. Bowes, and Osborn and Burt, his trustees, appear to have discovered before the month of January, 1814, the mistake into which they had fallen; and two further deeds were then executed for the purpose of curing the defect. By the former of these deeds, which bears date the 6th January, 1814, and is made between Barber and Parry of the one part, and the dean of the other part, reciting, that at the time of the granting of the lease of the 7th April, 1812, the estate and interest created by the original demise of the 26th December, 1803, was vested in Barber and Parry; and also reciting, that the fact of the assignment to them by the deed of the 3rd October, 1811, was not known to the parties by whom the said act was solicited, it is witnessed that Barber and Parry did bargain, sell, and surrender to the dean the whole of the said Shadwell estate, to the intent that the term of forty years created by the lease of 26th December, 1803, might be merged in the freehold, and that the dean might execute a new lease to Osborn and Burt according to the said, act. By the other deed, which bears date the 29th January, 1814, and is made between the dean of the first part the said Thomas Bowes of the second part, and the said Osborn and Burt of the third part, *the dean, in consideration of the EFFECTUAL surrender* of the two prior leases of the 26th December, 1803, and the 7th April, 1812, and for the other considerations therein mentioned, demised the Shadwell estate, pursuant to the said act of Parliament, to Osborn and Burt, their executors administrators, and assigns, for a term of ninety-nine years. The interest of Osborn and Burt under these two leases to them has, by various assignments, become vested in the plaintiff, and there is no doubt but that he is entitled to recover the rent in question in this action, if Osborn and Burt would have been so entitled. Such being the principal facts, we must consider how they bear on the several issues raised by the pleadings. The declaration, after stating the demise from the dean to Ord and Planta in 1803, and the underlease from them to Reed in 1808, goes on to state, that by the deed of the 3rd October, 1811, Ord and Planta assigned all their interest in the premises to Barber and Parry, and that the

dean, being seized of the reversion expectant on the term of forty years, so assigned to Barber and Parry by the indenture of the 31st August, 1812, demised the premises to Osborn and Burt for a term of ninety-nine years, by virtue thereof they became entitled to the reversion for that term. The declaration then goes on to state, that by the indenture of the 6th January, 1814, Barber and Parry assigned their interest to the dean, to the intent that he might grant a new lease to Osborn and Burt; and that afterwards, on the 29th day of the same month of January, 1814, the dean, by the indenture of that date, made a new demise of the premises to Osborn and Burt for a fresh term of ninety-nine years, they by the same indenture surrendering the former term created by the demise of the 31st August, 1812. The declaration then traces the title in the present plaintiff by assignment from Osborn and Burt previously to Christmas, 1820, and so claims title to the rent accrued due after that date. To this declaration the defendants pleaded six pleas. First, a plea traversing the averment, that at the time of the demise to Osborn and Burt of the 31st August, 1812, the dean was seized in fee of the reversion; secondly, a plea traversing that demise; thirdly, a plea traversing the assignment by Barber and Parry to the dean, to the intent that he might grant a new lease to Osborn and Burt; fourthly, a plea traversing the surrender by Osborn and Burt of the first term of ninety-nine years; fifthly, a special plea, stating the indenture of the 7th April, 1812, whereby Ord and Planta became entitled to the reversion for forty years from Christmas, 1811, and so continued until up to and after the execution of the indenture of the 29th April, 1814; sixthly, a plea traversing the demise to Osborn and Burt by the indenture of the 29th January, 1814. Issue was joined on all the pleas except the fifth, and to that the plaintiff replied, that after the making of the lease of the 7th April, 1812, and before the lease of the 31st August, 1812, the private act of Parliament was passed, authorising the dean, on the surrender of the existing lease, to grant a lease for ninety-nine years to Osborn and Burt; and the replication then avers that the lease of the 31st August, 1812, was duly made in pursuance of the act, and that at the time when it was made,

the lease of the 7th April, 1812, was duly surrendered. To this the defendant rejoins, traversing the surrender of the lease of the 7th April, 1812, and on this issue was joined. The second, third, and sixth issues, it will be observed, are mere traverses of the execution of the deeds, which are found by the special case to have been duly executed; and as the traverse merely puts in issue the fact of the execution, and not the validity of the deeds or the competency of the parties to make them, the verdict on those issues must certainly be entered for the plaintiff: and so must that on the fourth issue, whereby the defendants traverse the surrender by Osborn and Burt of the first term of ninety-nine years, when the demise of the second term was made to them. It is quite clear that the acceptance of the second demise was of itself a surrender in law of the first, even if no surrender in fact was made. For whom, then, is the verdict on the remaining issues, the first and fifth, to be entered? The issue on the fifth plea is, it will be observed, whether the lease of the 7th April, 1812, was duly surrendered at the time of the making of the indenture of the 31st August, 1812. And the issue on the first plea is substantially the same; for, if the plaintiff succeeds in shewing that the indenture of the 7th April, 1812, was duly surrendered, as set forth in his declaration, then it follows that the dean was at that time seized of the reversion, and so the plaintiff must succeed on the first issue: if, on the other hand, he fails on the fifth issue, he must also fail on the first. The real question for our consideration therefore is, whether the plaintiff has succeeded in shewing that the term of the 7th April, was surrendered previously to the execution of the indenture of the 31st August, 1812. On this subject it was argued by the counsel for the plaintiff, first, that the circumstances of the case warranted the conclusion that there was an actual surrender in fact; and if that be not so, then secondly, that they prove conclusively a surrender in point of law. We will consider each of these propositions separately; and first, as to surrender in fact. The subject matter of the lease of the 7th April, 1812, was, it must be observed, a reversion—a matter therefore lying in grant and not in livery, and of which, therefore, there could be no valid

surrender in fact otherwise than by deed ; and what the plaintiff must make out, therefore, on this part of his case is, that before the execution of the first lease for ninety-nine years, Ord and Planta, by some deed not now forthcoming, assigned or surrendered to the dean the interest which they had acquired under the lease of the 7th of April. But what is there to warrant us in holding that any such deed was ever executed? Prima facie a person setting up a deed in support of his title is bound to produce it. But undoubtedly this general obligation admits of many exceptions. Where there has been long enjoyment of any right which could have had no lawful origin except by deed, there in favour of such enjoyment all necessary deeds may be presumed, if there is nothing to negative such presumption. (a) Has there then in this case been any such enjoyment as may render it unnecessary to shew the deed on which it has been founded? The only fact as to enjoyment stated in the case has precisely an opposite tendency. It is stated, so far as relates to the property the rent of which forms the subject of this action, namely, the houses, &c., underlet to Reed, that no rent has ever been paid ; and therefore, as to that portion of the property included in the lease of April, 1812, there has certainly been no enjoyment inconsistent with the hypothesis that the lease was not surrendered. The circumstances on which the plaintiff mainly relies, as establishing the fact of a surrender by deed, are the statements in the two leases to Osborn and Burt, that they were made in consideration, *inter alia*, of the surrender of the lease of the 7th April, and the fact of that lease being found among the dean's muniments of title. These circumstances, however, appear to us to be entitled to very little weight. The ordinary course pursued on the renewal of a lease is, for the lessee to deliver up the old lease on receiving the new one, and the new lease usually states that it is made in consideration of the surrender of the old one. No surrender by deed is necessary where, as is commonly the case, the

(a) The important subject of the presumption of the surrender of their terms by trustees for years, has been elaborately discussed by Sir E. Sugden, in his work on Vendors and Purchasers, vol. 3, c. 15, s. 3, 10th ed. With respect to the presumptions made in support of beneficial enjoyment in general, see "Presumptions of Law and Fact, &c.," where the cases on the subject are collected. Part 2, c. 3, §§ 108-122.

former lessee takes the new lease; and all which is ordinarily done to warrant the statement of the surrender of the old lease, as part of the consideration for granting the new one is, that the old lease itself, i.e., *the parchment on which it is engrossed*, is delivered up. Such surrender affords strong evidence that the new lease has been accepted by the old tenant, and such acceptance undoubtedly operates as a surrender by operation of law, and so both parties get all which they require. We collect from the documents that this was the course pursued on the occasion of making the lease of the 26th December, 1803, and the lease of the 7th April, 1812; and we see nothing whatever to warrant the conclusion that anything else was done on occasion of making the lease to Osborn and Burt. When a surrender by deed was understood by the parties to be necessary, as it was with reference to the term assigned to Barber and Parry, then it was regularly made, and the deed of surrender was endorsed on the lease itself. There is no reason for supposing that the same course would not have been pursued as to the lease of April, 1812, if the parties had considered it necessary. If any surrender had been made, no doubt the deed would have been found with the other muniments of title. No such deed of surrender is forthcoming, and we see nothing to justify us in presuming that any such deed ever existed. We may add, that the statement in the new lease, that the old one had been surrendered, cannot certainly of itself afford any evidence against the present defendants, who are altogether strangers to the deed in which those statements occur. It remains to consider, whether, although there may have been no surrender in fact, the circumstances of the case will warrant us in holding that there was a surrender by act and operation of law. On the part of the plaintiff it is contended that there is sufficient to justify us in such a conclusion; for it is said, the fact of the lease of the 7th April, 1812, being found in the possession of the dean, even if it does not go the length of establishing a surrender by deed, yet furnishes very strong evidence to shew that the new lease granted to Osborn and Burt was made with the consent of Ord and Planta, the

lessees under the deed of 7th April, 1812. And this, it is contended, on the authority of *Thomas v. Cook* (2 B. & A. 119 ; 2 Stark 408) and *Walker v. Richardson* (2 Mee & W. 882), is sufficient to cause a surrender by operation of law. In order to ascertain how far these two cases can be relied on as authorities, we must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid, if his particular estate had continued to exist. There, the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man ; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accept from his lessor a grant of a rent issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent ; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. It is needless to multiply examples. All the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law then says, that the act itself amounts to a surrender. In such case, it will be observed, there can be no question of *intention*. The surrender is not the result of intention ; it takes place independently and even in spite of intention. Thus, in the cases to which we have adverted, of a lessee taking a second lease from the

lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to shew that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties. These principles are all clearly deducible from the cases and doctrine laid down in Rolle, and collected in Vin. Abr. tit. "Surrender," F. and G., and in Com. Dig. tit. "Surrender," I. 1 and I. 2, and the authorities there referred to. But, in all these cases, it is to be observed the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner is not sufficient. Brooke, in his Abridgment, tit. "Surrender," pl. 48, questions the dictum of Frowick, C. J., who says, "If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender," and says he believes it is not law; and the contrary was expressly decided in the case of *Swift v. Heath* (Carth. 109, 110), where it was held, that the consent of the tenant for life to the remainder-man making a feoffment to a stranger, did not amount to a surrender of the estate for life; and to the same effect are the authorities in Vin. Abr. "Surrender," F. 3 and 4. If we apply these principles to the case now before us, it will be seen that they do not at all warrant the conclusion, that there was a surrender of the lease of the 7th of April, 1812, by act and operation of law. Even adopting, as we do, the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question affords cogent evidence of their having consented to the making of the new lease, still there is no estoppel in such a case. It is an act which, like any other ordinary act in pais, is capable of being explained; and its effect must, therefore, depend not on any legal consequence necessarily attaching or, and arising out of, the act itself, but on the *intention* of the parties. Before the Statute of Frauds, the tenant in possession of a corporeal hereditament might surrender his term by parol, and therefore the circumstance of his delivering up his lease to the lessor might afford

strong evidence of a surrender in fact, but certainly could not, on the principles to be gathered from the authorities, amount to a surrender by operation of law, which does not depend on intention at all. On all these grounds, we are of opinion, that there was in this case no surrender by operation of law; and we should have considered the case as quite clear, had it not been for some modern cases, to which we must now advert. The first case, we believe, in which any intimation is given that there could be a surrender by act and operation of law, by a demise from the reversioner to a stranger with the consent of the lessee, is that of *Stone v. Whiting* (2 Stark. 235), in which Holroyd, J., intimates his opinion that there could; but there was no decision, and he reserved the point. This was followed soon afterwards by *Thomas v. Cook* (reported in 2 Stark, 408, and 2 B. & Ald. 119). That was an action of debt by a landlord against his tenant from year to year under a parol demise. The defence was, that the defendant Cook, the tenant, had put another person (P.) in possession, and that Thomas, the plaintiff, had, with the assent of Cook, the defendant, accepted P. as his tenant, and that so the tenancy of Cook had been determined. The Court of King's Bench held that the tenancy was determined by act and operation of law. It is a matter of great regret that a case involving a question of so much importance and nicety should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested which would have led the court to pause before they came to the decision at which they arrived. Mr. Justice Bayley, in his judgment, says the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit,—an observation which forcibly shews the uncertainty which the doctrine is calculated to create. The acts in pais which bind parties *by way of estoppel* are but few, and are pointed out by Lord Coke (Co. Litt. 352, a). They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, and less formal and solemn than the execution of a deed; such are *livery, entry, acceptance of an estate*, and the like. Whether a

party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed, if they are liable to be affected by such accidents as those alluded to by Mr. Justice Bayley. If the doctrine of *Thomas v. Cook* should be extended, it may very much affect titles to long terms of years—mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person. To hold that such a transaction could under any circumstances amount to a surrender by operation of law, would be attended with most serious consequences. The case of *Thomas v. Cook* has been followed by others, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision, that, in such a case, there was a surrender by act and operation of law, we should, probably, not have felt ourselves justified in overruling it; and, perhaps, the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenant, which would have the effect of eviction by the landlord himself in suspending the rent, or compensation for use and occupation, during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles. If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, and of which demises may, therefore, be made by parol or writing, and where there is an open and notorious shifting of the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal hereditaments are disposed of, which pass only by deed. With respect to these, we think we ought to abide by the ancient rules of the common law, which have not been broken in upon by any modern decision; for that of *Walker v. Richardson* (in 2 Mee. and W. 882), which has been much relied on in argument, is not to be considered as

any authority in this respect, inasmuch as the distinction, that the right to tolls lay in grant, was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself. Moreover, *according to the report of that case*, it would seem that the new lessees had, before they accepted their lease, become entitled to the old lease by an actual assignment from the old lessee. If this were so, there could, of course, be no doubt but that the old lease was destroyed by the grant and acceptance of the new one. It is, however, right to say, that we believe this statement to have crept into the report inadvertently, and that there was not, in fact, any such assignment. The result of our anxious consideration of this case is, that the verdict on the issue on the first plea, and on the rejoinder to the replication to the fifth plea, must be entered for the defendants, and as those pleas go to the whole cause of action, the judgment must be for them. In the case as it was originally stated, it did not appear that there had been any change of dean since the original demise in 1803. We desired to have the case amended on this point, in order that the fact might appear if the case should be turned into a special verdict; for, during the incumbency of the dean who made the lease for ninety-nine years, that lease would be good, independently of the private act; and as the immediate reversion on which the defendant's lease depended was assigned to the dean by Barber and Parry previously to the demise of the 29th January, 1814, that reversion undoubtedly passed to Osborn and Burt, and would enable them, or the plaintiff claiming under them, to sue for the rent so long as the estate of the same dean continued, whether the lease for ninety-nine years was or was not warranted by the act; and so the plaintiff might possibly have been entitled to judgment non obstante veredicto. It appears however by the case as now amended, that the Bishop of Lincoln, who was the dean granting the lease of ninety-nine years, ceased to be dean, and was succeeded by Dr. Van Mildert, in October, 1820, before any part of the rent sought to be recovered in this action had accrued due, and therefore no

question on this head arises. Neither will the second private act stated in the case aid the plaintiff. It appears that in 1820, the difficulties in which the parties had involved themselves, by neglecting to get a proper surrender of the lease of the 7th April, 1812, were brought under the consideration of the Court of Chancery, in a suit there pending relative to the affairs of the Bowes family. Master Cox, by his report of the 15th February, 1820, stated that he was of opinion that both the leases of ninety-nine years were void ; the first, because it was made when the original term of forty years was outstanding in Barber and Parry, and the latter, because at the time of its creation, the lease of the 7th of April, 1812, was still outstanding ; thus shewing clearly his opinion that nothing had happened to cause a surrender of that lease by operation of law ; and he recommended that an act of Parliament should be obtained to remedy the defect. His report was afterwards confirmed, and the second act stated in the case was accordingly obtained. That act received the royal assent on the 15th July, 1820, and it was thereby enacted that the lease of the 29th January, 1814, should be valid to all intents and purposes ; and further, that immediately after the passing of the act, the leases of the 26th December, 1803, the 7th April, 1812, and the 31st August, 1812, should be void to all intents and purposes. The effect of this was to destroy altogether the reversion in respect of which the rent now sought to be recovered was payable, and it may therefore well be doubted, whether, even if all the issues had been found for the plaintiff, he could have had judgment. It is, however, sufficient for us to say, that the act certainly does not entitle the plaintiff to anything to which he would not have been entitled if no such act had passed, more especially when it is considered, that by the saving clause the defendants are excepted out of the operation of the act. The result, therefore, is that the verdict on the first and fifth issues must be entered for the defendants, and on the other issues for the plaintiff, and the judgment will be for the defendants.

Judgment for the defendants.

HENDERSON and Wife v. HENDERSON.

SIMS v. HENDERSON.

8 Jurist, 755.

An action is maintainable upon a decree of a foreign Court of Equity, in a suit which has terminated in ascertaining a clear balance, whereby one party is ordered to pay a sum certain to the other. *Quære*, whether an action is maintainable upon a similar decree of a Court of Equity in England.—A judgment of a colonial court is not open to examination, as to the merits of it, in an action brought upon it in the courts of this country. Where, therefore, to a declaration on a decree, of the equity side of the Supreme Court of Newfoundland, there was a plea that the decree was founded on a suit by the plaintiff in a representative right, in which she did not show a representative title, and also pleas of set-off:—Held, that the subject-matter of these pleas was pleadable in the Court of Newfoundland, and that they were no answer to the action.—As to an objection, that the declaration did not show the jurisdiction of the court, leave was given to amend after argument.

Declaration states that heretofore, to wit, on the 26th September, 1842, the defendant was indebted to the plaintiffs in the sum of 8883*l.* 6*s.* 8*d.*, upon and by virtue of a certain decree and sentence before then, to wit, on the 2nd day of June, 1841, made in and by her Majesty's Supreme Court of Newfoundland, in a certain matter and cause then depending in the said court on the equity side of the said court, wherein one Elizabeth Henderson and the now plaintiffs C. Henderson and Johanna Charlotte his wife and one W. Henderson were plaintiffs, and the now defendant Bethel Henderson was defendant, by which said decree and sentence it was ordered and decreed that the now defendant should pay to the now plaintiffs C. Henderson and Johanna Charlotte his wife a large sum of money, to wit, the sum 8883*l.* 6*s.* 8*d.* sterling money of Great Britain, which said sum is still wholly unpaid and unsatisfied to the plaintiffs, although a reasonable time from the making of the said decree for the payment of the said moneys had elapsed long before the commencement of this suit; and which said order and decree still remains in full force and effect, not in anywise reversed, set aside, or otherwise vacated; whereby an action hath accrued to the now plaintiffs to demand and have, of and from the defendant, the said sum of 8883*l.* 6*s.* 8*d.*, being the sum above demanded; yet the defendant hath not paid the said sum above demanded, or any part thereof, to the plaintiffs' damage of 1500*l.* Fourth plea: that the said decree and sentence was made for and in respect of

matters of trust and executorship accounts, and of matters not cognisable in a court of law ; and this, &c. Sixth plea : that the said decree and sentence was founded upon a certain bill filed in the said court ; and that by the said bill (to wit, the original bill) Elizabeth Henderson, widow of Jordan Henderson, deceased, sued as such widow in right of the said deceased, and the plaintiffs in right of the plaintiff Johanna Charlotte, as one of the children of the deceased, without shewing, nor did there appear to be, any right of representation, either in herself or either of the plaintiffs, or in any other person, to warrant such suit, and that such decree was made upon matters of complaint solely in right of the said deceased ; and this, &c. Seventh plea : that the said decree and sentence was founded upon a certain bill filed in the said court, and that such bill prayed, and such decree and sentence proceeded upon such prayer, for an account of certain property of one William Henderson, deceased, and in his right, and that no person representing him the said William Henderson was a party complainant in the said suit : and this, &c. Eighth plea : that the sum ordered and decreed by the said decree and sentence to be paid by the defendant to the plaintiffs, was for and in respect of a right claimed and asserted by and on behalf of the plaintiff Johanna Charlotte, through and in right of her father Jordan Henderson, deceased, and in no other right. And the defendant further says, that the said Jordan Henderson, before and at the time of his death, was indebted to the defendant in 10,000*l.*, for money before then lent and advanced by the defendant to the said Jordan Henderson, at his request ; and in 10,000*l.*, for money by the defendant before then paid for and on account of the said Jordan Henderson, at his request ; and in 5,000*l.*, for interest due from the said Jordan Henderson to the defendant, upon and for the forbearance of divers sums of money due from the said Jordan Henderson to the defendant, and by him forborne to the said Jordan Henderson, at his request ; and in 10,000*l.*, for money before then had and received by the said Jordan Henderson for the use of the defendant ; and in 10,000*l.*, for money before then found to be due from the said Jordan Henderson to the defendant, upon an account before then stated between them ;

which said sums of money all remained due and unpaid to the defendant at the time of the commencement of this suit, and still remain due and unpaid, and which said sums exceed the amount directed to be paid by the defendant by the said decree and sentence, and out of which sums the defendant is ready and willing, and hereby offers to set-off and allow the amount so directed; and this, &c. Ninth plea: that the sum ordered and decreed by the said decree and sentence to be paid by the defendant to the plaintiff, was for and in respect of a right claimed and asserted by and on behalf of the plaintiff Johanna Charlotte, through and in right of her father Jordan Henderson, deceased, and in no other right, and for and in respect of a matter and cause cognisable only in a court of equity. And the defendant further says, that during the lifetime of the said Jordan Henderson, he and the defendant carried on business in partnership together, and that such partnership continued down to the time of the death of the said Jordan Henderson; and that at the time of the death of the said Jordan Henderson, there was due from him to the defendant, for and in respect of the several matters and accounts of the said partnership, a sum exceeding the amount directed to be paid by the defendant by the said decree and sentence, to wit, the sum of 10,000*l.*, out of which said sum the defendant is ready and willing, and hereby offers to set-off and allow to the plaintiffs the amount so directed by the said decree and sentence; and this, &c. Last plea: that the sum ordered and decreed by the said decree and sentence to be paid by the defendant to the plaintiffs, was for and in respect of a right claimed and asserted by and on behalf of the plaintiff Johanna Charlotte, through and in right of her father Jordan Henderson, deceased, and in no other right, and for and in respect of a matter and cause cognisable only in a court of equity. And the defendant further says, that during the lifetime of the said Jordan Henderson, he and the defendant carried on business in partnership together, and that such partnership continued down to the time of the death of the said Jordan Henderson; and that after the death of the said Jordan Henderson, the said business (formerly the said partnership business) was carried on by him the said defendant for his benefit,

and that of the persons entitled (as representing the said Jordan Henderson) to his share and interest therein, and that such business was so carried on after the death of the said Jordan Henderson, by him the said defendant, as an accounting party, and a party liable to be called on to account for and in respect of the said business and the accounts relating thereto. And the defendant further says, that before and at the time of the making of the said sentence and decree, there was justly due to him, upon the accounts in respect of the several matters aforesaid, a sum exceeding the sum ordered to be paid by the said decree and sentence, to wit, a sum of 10,000*l.*; and the said sum has ever since remained, and still is unsatisfied; out of which said sum the defendant is ready and willing and hereby offers, to set-off and allow the said sum so ordered by the said decree to be paid; and this he is ready to verify. Special demurrers, and joinders therein. The case was argued in last Michaelmas Term, (Nov. 10), by

Sir *W. W. Follett*, S. G., in support of the demurrer.—First, an action at law is maintainable upon a decree of a foreign or colonial court of equity. *Henley v. Soper*, (8 B. & C. 16), which was an action upon a judgment of the same court of Newfoundland; and *Russell v. Smyth*, (9 Mee. & W. 810). Secondly, if there are any defects in the proceedings, as, that any persons are omitted who ought to have been made parties, that is ground for an appeal. Thirdly, any question of set-off to be considered and determined by the law of the country in which the judgment is given. As to the declaration, the defendant will contend that it is bad in substance, in not sufficiently shewing the jurisdiction, or the proper description of the court. But the Act of Parliament (5 Geo. IV. c. 67,) which established it, gives it the name which is stated in the declaration; and if it was not constituted by statute, this would be only ground of special demurrer; (*Church v. The Imperial Gas Light and Coke Company*, 6 Adol. & Ell. 856). and it is not one of the grounds of this special demurrer.

Barstow, contra.—The objection to the declaration is good on general demurrer, and is not answered by *Church v. The Imperial Gas Light and Coke Company*, (6 Adol. & Ell. 846). In that case the objection was to the description of the court;

here the objection is to the jurisdiction. The declaration does not state either the place where the court was holden, or the person before whom it was holden. This is necessary for the purpose of shewing jurisdiction in pursuance of sect. 2 of stat. 5 Geo. IV. c. 67; and the intendment which will be made in favour of the proceedings of a court does not arise, unless it is sufficiently shewn in pleading that the court had jurisdiction over the cause. (*Moravia v. Sloper*, Willes, 30, cited in William's note 1 to *Pitt v. Knight*, 1 Saund. 90) There is no case in which the declaration does not state them. [Lord *Denman*, C. J.—Is the style of the court declared by act of Parliament in any of those cases, as it is here, by sect. 1 of stat. 5 Geo. IV. c. 67?] *Walker v. Witten*, (1 Doug. 1), which was debt on a judgment in the Supreme Court of Jamaica. [Lord *Denman*, C. J.—It is averred that the “cause was then depending in the said court.”] But it is not averred that the court was sitting locally within the jurisdiction assigned to it. It is not either the person who sits as judge, or the place where the court is usually held, which constitutes the court, but the union of the two, viz. the person duly authorized, and the local habitation of the court. Here it is not shewn that the court was held in Newfoundland, or one of its dependencies. As to the fourth plea: this action is founded on a decree of a colonial court of equity, which is not like a decree of a foreign court. The general principle, that an action will not lie to enforce a decree of a court of equity, is laid down in *Carpenter v. Thornton*, (3 B. & A. 52). An action will not lie on a decree of a court of equity in Ireland. [Lord *Denman*, C. J.—The court of Newfoundland could not enforce its decree here.] The party in whose favour the decree was made might apply to a court of equity here. In *Henley v. Soper*, (8 B. & C. 16; 2 M. & R. 153), which was an action upon a judgment of the same court as constituted by 5 Geo. IV. c. 67, it appears from the latter report that the proceedings were on the law side of the court, and in respect, therefore, of a matter which could be sued for in a court of law. [Lord *Denman*, C. J.—The sixteenth section puts the two proceedings upon the same footing, so that the same remedy is given in respect of a judgment in an equitable

as a judgment in a legal matter.] But the court sits for a different purpose when it hears and decides upon an equitable claim. The only authority in favour of the plaintiff is the dictum of Lord Ellenborough in *Sadler v. Robins*, (1 Camp. 253), which was assumptit on a decree of the Court of Chancery in Jamaica. He said, that had the decree been perfected, he would have given effect to it, as well as to a judgment at common law. But that was extra judicial, because the plaintiff failed on another ground, and an impression then prevailed that a court of equity in this country had not the power of enforcing the decree of a court of equity in a colonial court. (See by Lord Tenterden, in *Henley v. Soper*, 8 B. & C. 19). But it has since been determined that it can. (*Houlditch v. The Marquis of Donegal*, 8 Bligh, 301, 337). If the court will give effect to this judgment, it will do so only in the way in which a court of equity would. Courts of equity exercised a jurisdiction as to set-off before the statute of set-off conferred it upon courts of law. (Sir John Hamilton *v. Houghton*, 2 Bligh, O. S. 169). [Lord Denman, C.J.—The answer is, that these things were for the consideration of the court, which has given judgment against the defendant. After taking all matters into consideration, it has decreed that the defendant owes so much money. If that judgment was wrong, you should appeal.] That judgment is not conclusive. (*Houlditch v. The Marquis of Donegal*, 8 Bligh, 301, overruling the judgment of the Vice-Chancellor in *Martin v. Nicolls*, 3 Sim. 458). The sixth plea is founded on sect. 5 of stat. 5 Geo. IV. c. 67. The plaintiff in this cause sued in her own right, not stating that she sued as administratrix or executrix. [Lord Denman, C. J.—None of the pleas state that there was error, but only facts from which it is to be inferred, and which ought to have been used as a defence in the court of Newfoundland]. In one sense it is an erroneous judgment, because it has been obtained by a person who was not clothed with a character which alone entitled her to it. It may be sufficient to obtain letters of administration or probate after the commencement of the suit; (*Williamson Executors*, 1501); but the plea excludes that suggestion. The plaintiff could only claim the debt for which judgment

has been given in her representative character; and therefore, if this court proceeds in the same course as a court of equity would do, it will not give effect to this judgment. [Lord *Denman*, C.J.—If the defendant had a defence in the court of Newfoundland, which was overruled, she might have a remedy either by filing a bill in Chancery, or an appeal to a Judicial Committee of Privy Council, or perhaps by way of defence to the action. [As to the pleas of set-off, he cited *Rawson v. Samuel*, (1 Cr. & Phill. 161, 178.)]

Sir *W. W. Follett*, S.G., in reply—First, it is doubtful whether any suit could be maintained in a court of equity upon this decree, which is simply to pay a certain sum of money. [Lord *Denman*, C.J.—The only difference between the facts in *Henley v. Soper* (8 B. & C. 16) and those in this case is, that in that, there were in the first instance, equitable proceedings, which were referred to an arbitrator.] In *Houlditch v. Marquis of Donegal*, (8 Bligh, 301), the judgment was upon a matter which could not be enforced at law. The defendant might have filed a bill in equity here to restrain the plaintiff from suing upon the judgment, if there was any error in it. Indeed, an application to that effect has been made to the Court of Chancery, which has given judgment against the defendant upon demurrer. *Sadler v. Robins* (1 Camp. 253) is an authority for the plaintiff. [Lord *Denman*, C. J.—*Henley v. Soper* (8 B. & C. 16) was not cited in *Houlditch v. Marquis of Donegal*, (8 Bligh, 301). The only question in that case was, whether the Court of Chancery had done right in dismissing the bill. It seems a strange function to assign to a court of equity here to enforce the decree of a court of equity elsewhere.] In *Russell v. Smyth*, (9 Mee. & W. 810, 819), Parke, B., said, “Where the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay which may be enforced in this country.” The judgment of a foreign court, when sought to be enforced here, may be examined so far as to see whether it is warranted by the law of the foreign state, (Eyre, C.J., in *Philips v. Hunter*, in error, 2 H. Black, 410, cited in *Martin v. Nicolls*, 3 Sim. 458, 463), but no further. If the judgment is sought to be impeached, it must be on some ground

which would be an answer to it in the courts where it was pronounced. In most foreign courts, there is no such distinction between matters in law and matters in equity as prevails here; and there is no allegation in the plea, that the practice in this suit was not conformable to the law in Newfoundland, or that there was any defence which was overruled. The eighth and ninth pleas depend upon the same question, and they do not contain an averment, that, according to the law of Newfoundland, and the practice of the Supreme Court there, the sums could be set off.

Lord DENMAN, C.J.—If the plaintiff chooses to amend as to the place where the court sat, he may do so either *instanter*, or within a week, upon payment of the costs of such amendment.

Cur. adv. vult.

In Trinity Term, (May 31),

Lord DENMAN, C.J., delivered the judgment of the court—This was an action brought on a decree of the equity side of the Supreme Court of Newfoundland to recover a large sum of money, awarded thereby to be paid by the defendant to the plaintiff. This statement requires us to decide the general question, whether such an action can be maintained; the objection being, that a decree for non-payment of money by a court of equity is not a declaration, that the plaintiff has any legal right to the money, but only, that on certain views peculiar to that court, the payment ought to be made. On a former occasion, this objection was strongly felt by two of our most experienced lawyers, Mr. Justice Bayley and Mr. Justice Holroyd; who thought, also, that no promise to pay could be implied from a decree *in invitum*. Lord Tenterden and Mr. Justice Best acquiesced; the case of *Carpenter v. Thornton*, (3 B. & Ald. 52) being that of a decree by the Vice-Chancellor of England, for the payment of money which appeared to be due on equitable considerations only. On the other hand, Lord Ellenborough's opinion is clear in *Sadler v. Robins* (1 Camp. 253), that he ought to give the same effect to a decree of a foreign Court of Chancery as to a judgment at common law. We have also a decision in *Henley v. Soper*, (8 B. & C. 16), where the decree of a colonial Court of

Chancery in a partnership suit, which resulted in a clear balance due from one to the other, and awarded it to be paid, was held to support an action of assumpsit for that balance; and there Lord Tenterden does not appear to be entirely satisfied with *Carpenter v. Thornton*, (3 B. & A. 52); and Bayley, J. endeavours to distinguish it in a manner not very satisfactory. Holroyd, J., says, that he should have felt much doubt, but for Lord Ellenborough's dictum in *Sadler v. Robins*. Little Dale, J., saw no objection to giving full effect to the decree. This latter case is in some degree impugned, because part of the reasoning of Lord Tenterden is at variance with what has been more recently decided in the House of Lords. He thought it necessary for a court of law to act upon the decree, because he had understood that our Court of Chancery would decline to enforce it; but the House of Lords have decided that the Irish Chancery ought to entertain a bill founded on the decree of an English Court of Chancery, for the purpose of giving effect to it in regard to Irish property. Of course, the same principle would apply if the application had been made in the Chancery in England, to give effect to the decree of a foreign court. But we do not think Lord Tenterden's general reasoning impaired by the failure of that argument. The power of the Court of Chancery may exist without excluding that of other courts capable of giving a remedy as complete, and much more expeditious. The decree of foreign courts of equity may indeed, in some instances, be enforceable nowhere but in courts of equity, because they may involve collateral and provisional matters, to which a court of law can give no effect; but this is otherwise where the chancery suit terminates in the simple result of ascertaining a clear balance, and an unconditional decree that one party must pay it to another. The circumstances by which the court arrives at that conclusion do not appear to us to affect the right of suing in a court of law, which we consider to grow out of the legal duty to pay. An award to pay money, made under a submission to a reference, may possibly be founded exclusively on equitable considerations, but the party bound to perform it owes the money. We do not think that the consent to be so bound makes a stronger obligation than that of every subject

of the state to perform the duties imposed upon him by a court of justice exercising lawful jurisdiction over him. A judgment for liquidated damages, in an action of tort, is equally in invitum, and may equally be said to form no debt until the court has adjudged to the plaintiff his damages: but, when so adjudged, they are recoverable as a debt. Several pleas were pleaded to shew that the defendant had not had justice done him in the Court of Chancery at Newfoundland. This never is to be presumed; but the contrary principle holds, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, is repugnant to natural justice. But this does not admit of any inquiry on our part into the merits of the case on facts found. Whatever constituted a defence in that court, ought to have been pleaded there,—an observation which disposes of all the special pleas; not only those which rely on the want of a representative title in the plaintiff, although she sued in a representative right, but also the pleas of set-off, for these last, as the parties stand described on this record, are clearly unavailable. The plaintiff is suing in her own right, on a decree obtained in her own right. The set-off can only be maintained on the ground of an alleged defect in the plaintiff's title in the former suit, which ought to have been made the subject of defence there. If that suit was well decided, which we must now take it to have been, these pleas are bad. This is by no means inconsistent with *Smith v. Nicolls*, (5 Bing. N. C. 208). There, the Court of Common Pleas held, that a plea of judgment recovered in a colonial court not of record, in the defendant's absence followed by no execution, was not a bar to the plaintiff's recovering for the same cause of action in our courts: but no opinion was intimated that a question decided by the colonial court in a suit properly brought before it, was open to examination in an action brought upon its judgment here. Circumstances may indeed exist, which would render it unconscientious and unequitable to claim a sum which the court has decreed to be paid; but the same might be true of any sum recovered by the judgment of the highest court, or of any debt whatever. In such a case, the remedy is by application to the Court of

Chancery, which has ample means of preventing wrong from being effected by the iniquitous enforcement of a legal right. We do not think it necessary to weigh the opinion of this court in *Carpenter v. Thornton* (3 B. & A. 52) against that in *Henley v. Soper*, or decide that an action will lie on a decree of the High Court of Chancery, to recover a sum which that court may simply and unconditionally have directed the party to pay. That point may, perhaps, be open to fuller consideration when the question is raised; but we agree with Lord Ellenborough's opinion in *Sadler v. Robins* (1 Camp. 253), and observe, with satisfaction, that the Court of Exchequer acted in conformity with our present decision in *Russell v. Smyth* (9 Mee. & W. 810).

Judgment for Plaintiff.

SURPLICE V. FARNSWORTH.

8 Jurist, 760.

LANDLORD AND TENANT—USE AND OCCUPATION.—Where the defendant was tenant from year to year of certain malting premises, which, by reason of the default of the landlord in not repairing, according to his agreement so to do, had become unfit for malting purposes—Held, that that was no defence to an action for use and occupation for rent due subsequently to the premises becoming so unfit.

This was an action of assumpsit for use and occupation. Plea, non assumpsit. At the trial, before Mr. Baron Gurney, at the last spring assizes for Nottinghamshire, it appeared that the premises in respect of which the action was brought were certain malt-houses, and that the alleged use and occupation took place between Lady-day and Michaelmas, 1843. On the part of the defendant, evidence was given, that prior to Lady-day part of the roof had been blown off, and that the premises having thereby become unfit for malting purposes, the defendant had thereupon quitted the occupation, and tendered the key to the plaintiff, who however refused to accept it. Evidence was also given, that upon one occasion, the defendant having repaired a portion of the premises, the plaintiff had allowed the cost of the repairs to be deducted out of the ensuing half-year's rent. Upon this state of facts, it was contended at the trial, that the premises being unfit for malting purposes from Lady-day to Michaelmas, 1843, no rent could be recovered in respect of their occupation during that time. The learned judge, however, was of a different

opinion, and directed the jury to find for the plaintiff, leaving it also to the jury to determine whether these premises were in a fit state for malting after Lady-day, 1843, which they found in the negative. The verdict was then entered for the plaintiff, leave being reserved to set aside that verdict, and enter one for the defendant, if this court should be of opinion that the finding of the jury was a defence to the action.

Byles, Serjt., having in Easter Term last, on the part of the defendant, obtained a rule nisi for that purpose, citing *Smith v. Marrable* (11 Mee. & W. 5),

Clarke, Serjt., now shewed cause.—There is nothing in the facts of the present case to bring it within the authority of *Smith v. Marrable*, and the other authorities of that class. This action is brought for use and occupation of premises held under yearly tenancy, without any direct stipulation on the part of the landlord to repair, and the only evidence being, that upon one occasion the tenant having done some repairs, the landlord allowed the amount to be deducted from the rent. But, admitting that the landlord was bound to repair, and that the premises were for the whole term unfit for the purposes for which they were let, that is no answer to the present action. In *Edwards v. Etherington* (R. & M. 268; S. C. 7 D. & R. 117), the facts were infinitely stronger than in the present case. There, the walls were in such a delapidated state that it became unsafe to reside in the house, and the lodgers all quitted for that reason. [*Tindal*, C. J.—The landlord allowing the premises to remain in that state amounted to a quasi eviction.] *Collins v. Barrow* (1 M. & Rob. 112) was a nisi prius decision, and as the verdict went for the plaintiff, there was no opportunity of taking the opinion of a higher tribunal upon the direction of the learned judge. In *Salisbury v. Marshall* (4 C. & P. 65), the defendant, who held a house under an agreement “to become tenant by occupying,” was certainly held to be entitled to shew, in answer to an action for use and occupation, that the house was not in such a reasonable and decent state of repair as to be fit for comfortable occupation; but *Tindal*, C. J. there says, “I agree with the plaintiff’s counsel, that if there had been a separate agreement to do these repairs, then the not having done them

would furnish no defence." The ruling in this case moreover was never reviewed. These decisions formed the basis of the judgment of Parke, B., in *Smith v. Marrable*; but that case has been overruled by the Court of Exchequer itself in *Sutton v. Temple*, (12 Mee. & W. 52), in which a tenant was held not to be justified in throwing up land he had hired for the purpose of pasture, although it was utterly unfit and worse than useless for that purpose. And in *Hart v. Windsor*, (12 Mee. & W. 68), Parke, B., in giving judgment, says, "The defendant chiefly rests his case upon the decision of *Smith v. Marrable*. My judgment in that case certainly proceeded upon the authority of two previous decisions, which, though they contained a novel doctrine, had not been questioned in Westminster Hall, and had received, to a certain degree, the sanction of the Lord Chief Justice Tindal in a subsequent case. These cases were *Edwards v. Etherington*, before Lord Tenterden, and afterwards the Court of King's Bench, and *Collins v. Barrow*, and the last, before Lord Chief Justice Tindal, was *Salisbury v. Marshall*; and I thought they established the doctrine not merely that there was an implied contract on the part of the lessor, that the house demised should be habitable, but an implied *condition*, that the lease should be void if it were not, and the tenant chose to quit. From the full discussion which these cases have now undergone in the present argument, and that in the recent case of *Sutton v. Temple*, I feel satisfied they cannot be supported, if the reports of them are correct; and we all concur in opinion that they are not law,—an opinion strongly intimated in the case of *Sutton v. Temple*, in which this court decided, that there was no implied warranty of condition or fitness for a particular purpose in a lease of aftermath."

Byles, Serjt., contra.—The facts are sufficient here to raise the question whether an action for use and occupation will lie on a tenancy of premises which are useless for the purpose for which they were taken, owing to the default of the landlord in not repairing them. This is not an action of debt upon a demise, but of assumpsit for use and occupation. It appears upon the evidence that the tenant did what he could to deliver up the premises, but the landlord would not accept the sur-

render. *Salisbury v. Marshall* is a strong authority in favour of the defendant. *Edwards v. Etherington* was not disposed of upon the ground of eviction ; and the facts in that case were not so strong as they are in the present, for it does not appear that the landlord was bound to repair at all. *Collins v. Barrow* is still more in favour of the defendant. The tenant was in that case held to be justified in quitting, without notice, premises which were noxious and unwholesome for want of proper sewerage, although he was in possession under an agreement to repair. In *Cowie v. Goodwin*, (9 C. & P. 379), a party actually occupied premises which had been let to him under a written agreement. In the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises. This nuisance was not remedied by the landlord, and the tenant quitted as soon as he could obtain other premises. Lord Denman stated that he should ask the jury whether these premises were unfit for proper and comfortable occupation, and if the defendant had *bona fide* quitted the apartments as soon as he could procure others. The jury having answered both these questions in the affirmative, the plaintiff elected to be nonsuited. [*Tindal*. C. J.—That was a case of an occupation of ready-furnished lodgings, which became useless to the tenant in consequence of the landlord not repairing a part of the premises with which the defendant had nothing to do.] Still it was by the landlord's default that the premises became useless, which is the case here. If *Smith v. Marrable* be not overruled, it decides this case; and neither *Sutton v. Temple*, nor *Hart v. Windsor*, which have been relied upon by the other side, do overrule *Smith v. Marrable*. Parke, B., in giving judgment, says expressly that there was no necessity for deciding whether that case was law or not. *Hart v. Windsor* only decides that there is no implied contract on the part of the landlord to keep premises in repair, and therefore that the premises being in such a state of repair is not a condition precedent to the right to recover rent in respect of their occupation. But that does not apply to the present case, where there is an express contract on the part of the landlord to keep the premises in repair. In Rolle's Abridgment, "Apportion-

ment," p. 236, pl. 2, it is laid down, " If a man lease for life or years, rendering rent, and part of the land is surrounded by sea, that will make an appointment of the rent; for, although the soil still remains in him, it has become part of the sea, and as such, is common to everyone to fish therein as well as to the lessee, and there is no possibility of regaining it by ordinary intendment." The same rule should follow when the lands become useless to the tenant by the default of the landlord; and still more should it apply when the action is brought in respect of a beneficial use and occupation, and not upon the strict right to rent upon an indenture of demise. [*Tindal*, C.J.—Have you seen the case of *Izon v. Gorton*, (5 Bling. N. C. 501)? There it was held that the defendants, being tenants from year to year of two floors in a house, which, during their occupation was destroyed by accidental fire, were, nevertheless, liable to an action for use and occupation for the period which elapsed between the fire and the regular determination of the tenancy.] That case is distinguishable from the present, for the landlord had entered into no agreement to repair.

TINDAL.—C.J.—It is admitted that the rule which has been obtained in this case cannot be supported, unless upon the ground that the landlord was bound to do the necessary repairs to these premises; and allowing that he was so bound, no authority has been cited to us to shew that this agreement to do repairs operated as a condition precedent to his recovering rent which has become due. You find always in a contract under seal, where the intention of the parties is that such shall be the operation of the covenant, distinct words introduced, in order to make it operate as a condition precedent, without which it would not have that defect. If that be so, upon what legal principle can it be said, that an agreement by parol should be construed in this respect in a different manner from one under seal? And here there is no actual agreement that the doing of the repairs by the landlord was to be considered as a condition to be performed by him before he could claim rent for the premises. If the case of *Salisbury v. Marshall*, which has been relied upon in argument, be looked at, it will appear that something was to be done by the

landlord before the tenant entered. "There was an understanding between the parties that the premises should be put into proper repair;" and this might well be construed as forming a kind of condition precedent, and that the defendant was not compellable to enter until the house was put into such a state as that his family could reasonably be expected to occupy it. But after the case of *Izon v. Gorton*, (5 Bing N. C. 501), it is impossible to hold that the tenancy in the present case did continue, notwithstanding the landlord had neglected to do repairs which he was bound to execute.

COLTMAN, J.—I am of the same opinion. The cases of *Smith v. Marrable*, *Salisbury v. Marshall*, and even *Edwards v. Etherington*, possibly may be distinguished from the present case. It seems to me to be clear, that if a landlord entered into a contract to repair, he does not thereby make the compliance with that contract on his part a condition precedent to his suing for rent in arrear; and that the tenant's remedy, in such a case, is by an action upon the contract itself, and not by throwing up the possession of the premises. In the argument on behalf of the defendant, the rule was attempted to be supported upon the ground that this was an action for use and occupation, and not debt upon the contract of demise; but I think that there is nothing in that distinction.

CRESSWELL, J.—It seems to me, also, that this rule should be discharged. This is an action for use and occupation, founded upon an agreement entered into by the defendant to hold certain premises from year to year. It is contended that this tenancy had been put an end to before the rent sought to be recovered became due, by the non-performance of what the landlord had contracted to do. Now it is quite clear, that if the landlord had entered into a covenant to repair, the mere breach thereof on his part would not justify the tenant in abandoning the possession of the premises. Neither do I see why we should import such a consequence into a parol letting from year to year. Indeed there is less reason for doing so for the tenant may terminate the tenancy by a proper notice to quit.

Rule discharged.

BESSEY AND CALDECOTT V. WYNDHAM.

8 Jurist, 824,

In an action against the sheriff for seizing goods in execution, brought by a person who claims under the execution debtor, the warrant reciting a writ at the suit of the execution creditor is *prima facie* evidence of the seizure having been made by his authority.—An incorrect direction to the jury upon a point which was collateral to, and independant of, that upon which their verdict proceeded, is not a ground for a new trial.

Trover for a wherry. Pleas: first, not guilty; second, not possessed. At the trial before Lord Denman, C. J., at Norwich, at the summer assizes, 1843, it appeared that the plaintiffs were coal merchants at Yarmouth, not in partnership; that the wherry in question had belonged to Brundrett, who resided at Norwich, and that Brundrett being indebted to the plaintiff Bessey in the sum of 60*l.*, and to the plaintiff Caldecott in the sum of 100*l.*, by deed of the 2nd January, 1843, assigned to them the wherry in question as of the value of 50*l.*, with power to sell it. It was then lying at Norwich, near Brundrett's house, under the charge of a servant of Brundrett. The plaintiff Bessey went to the place where it was lying, and gave orders to load it with flints; but he took no further possession of it. On the 15th January it was seized under a warrant to the sheriff on behalf of Palmer, another creditor. This warrant was put in evidence, but not the writ of *fi. fa.* nor an examined copy of the judgment. The learned judge left to the jury the question, whether, after the execution of the deed, it was intended that the assignor should remain in possession of the wherry; in which case, the deed not being intended to pass any property, it was altogether a nullity. The jury found that nothing was intended to pass by the deed, and gave a verdict for the defendant.

In Trinity Term, (June 10th),

Lord DENMAN, C. J., delivered the judgment of the court. The sole question in this case turned on the effect of the deed-pool conveying the debtor's property to the plaintiff; the jury found that it was fraudulent, but the defendant's learned counsel contended, that although this might be so as against creditors, it operated to pass the goods as against the party himself and strangers, according to *Doed. Roberts v. Roberts*, (2 B. & Ald. 367), and other cases. It was also said that the sheriff ought to have proved the writ under which his officer

acted. We agree in this doctrine; but on looking at my notes of the evidence, it appeared that the only evidence to fix the sheriff was the production of his warrant, which recited a writ at the suit of A. B. A case of *Ames v. Hutton* was cited from the 6th volume of the old series of the *Law Journal*, where a ruling at *nisi prius*, that the letter of an under-sheriff produced by the plaintiff to affect the sheriff was evidence of the facts therein stated, which tended to excuse, was supported by the court. The matter was fully debated in *Gross v. Quinton*, (3 M. & Gr. 825), where the Court of Common Pleas held, that the plaintiffs the assignees of a bankrupt, who put in the defendant's examination before the commissioners as proof of his having taken certain property, made his cross-examination also evidence in the cause, wherein he stated, in answer to a question from his own attorney, that he had purchased it under a written agreement, without producing or accounting for such agreement, and without any notice to produce it. Here, therefore, the proof of seizure involves some evidence of its having been made by the authority of the execution creditor, and such evidence as leaves no possibility of doubt as to its truth. The validity of the deed as to its merits has been tried in a state of things more favourable to the plaintiff than if the judgment had been proved. It was argued, that the evidence ought to have been submitted to the jury, who ought to have exercised their judgment on its sufficiency, according to the well-established principle, that, if their verdict has been, or could have been, influenced by any evidence improperly received, the losing party has a right to a new trial. But we do not think that principle applicable here, when the evidence was neither objected to nor open to objection, and was in truth, conclusive upon the point. We think their verdict on the point which was submitted to them could not be at all influenced by it. The mistaken view taken by the judge, of the law respecting the validity of the deed against all but the creditors, could have no effect on the case, because the state of the facts makes it unnecessary(a). The rule therefore must be discharged.

Rule discharged.

(a) See *Wickes v. Clutterbuck*, (2 Bing. 483).

THE UPPER CANADA JURIST.

LAW MAXIMS.

Caveat emptor, qui ignorare non debuit quod jus alienum emit ; (a) viz :

Let a purchaser beware [without relying on any remedy by law], for he ought not to be ignorant of [the amount of] that other person's interest, which he is to purchase.

Simplex commendatio non obligat, (b) viz.

Mere commendation or puffing an article [at the time of sale] does not amount to warranting it.

Vigilantibus non dormientibus jura subveniunt, (c) [or succurrunt], viz.

The laws assist those who are vigilant, not those who slumber over their rights.

Volenti non fit injuria, viz.

Whatever a man does or submits to of his own will, affords him no ground of suit for injury, or of defence as done on compulsion. *(d)* For

Interest reipublicæ ut sit finis litium, or ut judicia rata sint, or res judicatas non rescindi, (e) viz.

It concerns the public that litigation should have an end, or that the judgments of courts should be adhered to as valid. And

Nemo debet bis vexari pro eadem causâ, si constet curiæ quod sit pro unâ et eadem causâ, (f) viz.

No one should be harrassed or *vexatiously* sued twice for what shall clearly appear to the court to be one and the same cause of action.

(a) Hobart's Rep. 99.

(b) Domat's Civil Law, 85.

(c) Wingate, 672, Lord Ray, 20, &c.

(d) Grendon v. Lincoln (Bp.), Plowd. 500 a ; Wingate, 482.

(e) 2 Inst. 83, &c.

(f) 2 Wils. 308; 2 Inst. 359.

Quilibet renunciare potest beneficio juris pro se introducto, (a) viz.

Every man is at liberty to reject the benefit which the law provides for him.

Modus et conventio vincunt [or faciunt] (b) legem ; viz. The methods or fashions of doing things, and the agreements of parties overpower or render null the law which would otherwise prevail. (c)

Pacto aliquid licitum est quod sine pacto non admittitur ; viz. An agreement will make that prevail as law, which, without such agreement, could not be admitted. (c)

Consensus tollit errorem ; (d) viz. The consent [of a party who might take advantage of an error] takes away its effect [or, removes it altogether].

But the last three rules do not extend to anything against the public rights or common weal, for

Conventio privatorum non potest publico juri derogare ; viz. The agreement of individuals cannot derogate from public right. (e)

In æquali jure qui prior est tempore potior est jure ; (f) or, Where the rights of two or more are equal, he whose right is the earliest has the better right, and should prevail.

No principle is in more daily application than “*Caveat emptor*” in sales of goods or land : for the common law, unlike the civil, raises no *implied* warranty by a seller of the quality, genuineness, or soundness of the chattel he sells or conveys to the buyer, though a liberal, or what has been called a “sound,” price be given. (g)

In the language of Fitzherbert, “a man’s eyes, taste, and senses must be his protection (h) in a purchase where no warranty is interposed. To carry this principle further, we have borrowed from the civil law their maxim, “*Simplex commendatio non obligat* ;” accordingly the mere commen-

(a) 1 Inst. 99 a.

(b) Cowper v Andrews, Hobart 40.

(c) Co. Lit. 16 b.

(d) 44 Edw. III. 6 ; 44 Ass. 4 ; Dyer, 367.

(e) Co. Lit. 166 ; Wingate, 746.

(f) Co. Lit. 14 a ; 1 Vent. 218.

(g) 1 Inst. 102 a ; 2 East. 314 ; 3 Camp. 351 ; Doug. 20.

(h) F. N. B. 94 ; 1 Ro. Abr. 96, as to wine, horses, &c.

dation of a chattel by its seller is called in our law a "nude assertion," and amounts to no more than an "invitation to custom," (a) without raising any implied warranty of the chattel; (b) for the buyer may and should inquire into its truth (c) at his own peril, if from laches he suffers loss.

Again a seller may affirm, that the chattel has not a particular defect, which is, however, obvious to the senses of a person possessing them: thus if a horse stated to be sound or perfect is visibly otherwise, viz., blind of an eye, or eyeless on one side, or is minus an ear or tail; or if a house, stated to be in good repair, has not a roof or windows, *caveat emptor*, for the vendor is not liable without express warranty. (d)

But on the other hand, if the defect is not plainly the object of the senses, and cannot be ascertained without collateral proof, e. g. measuring cloth falsely affirmed to be of a certain length, (e), and what is affirmed by the seller by way of encomium is known by him to be false, (f), or is mutually understood and intended by the parties to have been a warranty, without proof negating that intention, a warranty will be implied, and the seller held liable. (g) So a fortiori if he knew of the latent defect, and used any artifice to prevent its discovery, e. g. by putting a false and bright eye into the head of a horse who was without a natural one, (h), or undertook to deliver the articles sound and free from blemish *at the end of a given time*, but delivered them with a blemish, though it was obvious at the time of sale. (i)

Affirmation and warranty are the same in law, provided the latter was intended; so that no form of words, or the word

(a) Lord Ellenborough in *Arnott v Hughes*, Chit. Contr. 3rd edid. by Thompson Chitty, 359

(b) *Ibid.*; Cro. Jac. 4; 1 Ro. Abr. 101.

(c) 3 T.R. 55.

(d) 1 Salk. 211; 3 Bulst. 94; Cro. Jac. 387; 7 Bing. 605; 1 Vin. Abr. 578; 3 Bla. C. 165, 166; 10 Ves. 507; 3 T. R. 55; "Sound" means "perfect;" *Best v Osborn Ry. and M.* 291.

(e) *Finch's Law*, 189.

(f) *Risney v. Selby*. 1 Salk. 211; Lord Raym. 1118: *Dobell v. Stevens*, 3 B. & A. 625; *Wood v. Smith*, 4 C. & P. 45; Cro. Jac. 4, case of Bezoar Stone: See per Lawrence, J., 2 East, 323; 1 Rol. Abr. 90; Cowp. 566; 1 Lev. 102; 1 Sid. 146.

(g) Same cases. See 3 M. & Ry. 2; and *Lemi v. Tucker*, 4 C. & P. 15.

(h) 2 Roll. R. 5. See *Bagelhole v. Walters*, 3 Camp. 154, cited 4 Taunt. 783; *Schneider v. Heath*, 3 Camp. 506.

(i) *Kain v. Liddard*, 2 Bing. 83.

“warrant,” need be used. (a) But the sellers representation will not be regarded as a warranty, if it is merely matter of description or expression of opinion on a subject, on which he is imperfectly informed, or bona fide ignorant, e. g. the age or pedigree of a horse, or the master to whom an old painting may with truth be ascribed. For on these matters the purchaser may be equally able with himself to form a judgment; (b) but if a bill of parcels, or an advertisement, or particular contains the description of a ship, &c. as of a particular build or kind, or even attaches a master’s name to a picture, a jury may infer a warranty accordingly. (c) Canaletti, to whom so many paintings of scenes in Venice have been attributed, and who died in 1768, was not considered in 1836 so old a painter as to preclude all means of saying a picture is his, and therefore of warranting it; which seemed to be Lord Kenyon’s impression of the works of Claude Lorrain and Teniers the younger, who died, the first in 1682, the latter in 1694, and whose supposed works were sub judice in 1797, in *Jendwine v. Slade*, 3 Esp. N. P. C. 572. (c)

If on the sale of a chattel the quality of it is warranted to answer a sample produced, caveat emptor; for if the quality of the bulk corresponds, the vendor is not liable for latent defects unknown to him. (d) There the buyer has himself seen a part for the whole of the thing to be bought, and has himself at the time of sale dispensed with seeing the rest. Whereas where there is no opportunity to inspect the particular commodity ordered, as if it is on the way to this country the maxim does not apply, and both parties shall be taken to have intended that it should be saleable in the market under the denomination named in the contract. (e)

Nor does the maxim apply in cases which, like *Cox v. Prentice*, are cases of mutual innocence and equal error.” (f)

(a) 3 T. R. 57; 2 Sel. N. P. 638, (10th edit.); Co. Lit. 384 a; *Jones v. Bright*, 3 M. & P. 173; 5 Bing. 133; S. C. recognized in *Chanter v. Hopkins*, 4 M. & W. 406.

(b) *Peake*, C. N. P. 123; 5 Dow’s Rep. 164; 3 Esp. 572; 1 Lev. 102; 1 Sid. 146; 4 C. & P. 15, 5 id. 343.

(c) *Power v. Barham*, 4 Ad. & E. 473.

(d) *Parkinson v. Lee*, 2 East, 314: see 8 Bing. 52.

(e) *Gardiner v. Gray*, 4 Camp. 144, case of waste silk.

(f) See Lord Ellenborough’s Judgment, 3 M. & Sel. 344.

There a bar of silver was sold by defendant to the plaintiffs, to be paid for at a value fixed by the amount of silver certified to be in it by an assaymaster, employed by themselves at the defendant's expense. The assay was made, but turned out wrong in much over estimating the quantity of silver in the bar. The buyers offered to return the silver, and sued to recover the purchase money. The rule *caveat emptor* was held not to apply, both parties being under a mutual error ; for by the terms of the contract neither of them was to, or in fact did, exercise any judgment on the subject ; nor was the article sold of an arbitrary value. The plaintiffs recovered the difference in value between the supposed and the real weight of the silver in the bar. Nor will *caveat emptor* apply in the case of manufactured goods ordered for a particular purpose, and supplied accordingly ; for as the purchaser relies on the seller's judgment, the law implies a warranty by the latter that they are reasonably fit for that purpose, whether the buyer has an opportunity of inspecting them or not ; (a) and in *Brown v. Edgington*, Tindal, C. J., treats it as a distinction well founded both in reason and authority, that if a party purchases an article on his own judgment, he cannot afterwards hold the vendor responsible on the ground that the article turns out unfit for the purpose for which it was required ; but if he relies on the judgment of the seller, and informs him of the use to which the article is to be applied, it seemed to him that the transaction carried with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed.

Again, the custom of a particular trade may establish an implied warranty between parties transacting business therein, so as to oust the application of *caveat emptor*. (b)

Though an express warranty saves the vendee from the necessity of proving that the vendor knew his title to sell to be defective, or his goods to be unsound, (c) still, as it cannot

(a) *Laing v. Fidgeon*, 4 Camp. 169 ; 6 Taunt. 100 (saddles) ; *Bluett v. Osborn*, 1 Stark. R., 384 (bowsprit) ; *Gray v. Cox*, 4 B. & C. 115 ; *Jones v. Bright*, 5 Bing. 553, (copper sheathing for ships), assented to in *Brown v. Edgington*, 2 M. & Gr. 279.

(b) See per Heath, J., in *Jones v. Bowden*, 4 Taunt. 853, 847 ; remarked on in *Gray v. Cox*, 4 B. & C. 110, 114.

(c) *Williams v. Allison*, 2 East, 446 ; see 2 C. & P. 540.

be varied by the custom of the trade. (a) caveat emptor will apply to the terms in which it is couched. For no verbal representations by the seller, made without fraud can be added to a written, (or, semble, to a verbal) contract of warranty which does not embody them. (b)

An important question involving the application of caveat emptor to the discounting, or giving change for a bill, &c., may be thus stated :—Is a person who bona fide, and in the usual course of business, takes from another, for the purposes of discount or in payment, a check or note payable to bearer on demand, or a bill of exchange indorsed in blank, and pays value for it, entitled to recover as holder against the other parties, though, without his knowledge, it may have been stolen, lost, or improperly parted with before he obtained possession of it? This point has been held in favour of the plaintiff in many cases, subject to various tests adhibited by different judges; but the old doctrine of Lord Mansfield in 1758 in *Miller v. Race*, 1 Burrow, 452, followed by Lord Kenyon, at nisi prius, in *Lawson v. Weston*, appears to be that most recently acted on; for it is now held that the question for a jury in a case of the above kind is, not whether according to the view adopted by Lord Tenterden in summing up to them, the plaintiff took the note &c. under circumstances which ought to have excited the suspicion of a prudent man; (c) or as Lord Denman has directed them whether the plaintiff had been guilty of gross negligence in taking it under all the circumstances of the transaction; (d) or even, as it would now seem, whether, in the language of the Chief Justices Best and Tindal, he had used due caution in taking it; (e) but whether or not he acted bona fide, that is, *comme semble* in the fair and ordinary course of business in so doing. (f)

(a) *Yeats v. Pim*, 1 Holt, N. P. C. 95; 6 Taunt. 446, S. C.

(b) *Pickering v. Dowson*, 4 Taunt. 779, 786; *Mowens v. Heworth*, 10 M. & W. 147; *Kain v. Old*, 2 B. & C. 627; *Budd v. Fairmaner*, 8 Bing. 48; *Margitson v. Wright*, id. 454.

(c) *Gill v. Cubitt*, 3 B. & C. 466; *Down v. Halling*, 4 B. & C. 330 remarked on in *Crook v. Jadis*, 5 B. & Adol. 909; and *Backhouse v. Harrison*, id. 1105.

(d) *Goodman v. Harvey*, 4 Ad. & E. 870; for gross negligence, though evidence of mala fides, is not identical with it. S. C.

(e) *Snow v. Peacock*, 3 Bing. 406; *Easley v. Crockford*, 10 Bing. 243.

(f) *Goodman v. Harvey*, 4 Adol. & E. 870, adhered to per Cur. in *Uther v. Rich*. 10 Ad. & E. 784. See the plea of bona fide purchase in *Medina v. Stoughton*, 1 Salk. 211; 1 Lord Raym. 593, which was held bad; and other cases, Sel. N. P. 10th edit. 347, 348.

Different opinions have prevailed as to the application of caveat emptor, to the *title* of a party to a chattel which he takes on him to sell ; for, if he sell without title, and not in market overt, caveat emptor always applies, that is, the true owner may retake or recover them from the innocent purchaser. (a)

Lord Holt said in *Medina v. Stoughton*, that where one having possession of any personal chattel sells, it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation ; for his having possession is a colour of title, and perhaps no other title could be made out. Blackstone has laid down (2 Comm. 451, 3 id. 166), that in our law a purchaser of goods may have a satisfaction from the seller if he sell them *as his own*, and the title proves deficient, without any express warranty for that purpose. He cites *Furnis v. Leicester*, Cro. Ja. 474 ; 1 Ro. Abr. 90, (L 5), S. C., but in that case it appears that the seller *affirmed* he was owner. The cases of *Crosse v. Gardiner*, and *Medina v. Stoughton*, added in the New Commentaries by Mr. Serjeant Stephen, (b) in support of this position of Blackstone, are open to the same observation ; nor does the case of *Robinson v. Anderton* (c) carry the point further. Fixtures had there been sold by defendant to plaintiff as tenant's fixtures, which turned out afterwards to belong to the landlord ; and the plaintiff was permitted to recover back the price of them from the defendant, though he had not been guilty of any fraud, and had himself bought them as tenant's fixtures. However, as they were under the circumstances part of the freehold, (d) they were within the strict rule of caveat emptor as to title to *land*, which we shall presently notice. Considering the above, and finding express decisions that, unless a vendor affirms that the title to the goods is in him, knowing at the *time* that that statement is false, or knowing that the goods belonged to some

(a) 2 B. & Ald. 142, 149 ; Book of Assize, 42, Ass. pl. 48, cited Cro. Jac. 197.

(b) Viz. *Crosse v. Gardiner*, Carth. 90 ; Comb. 142 ; 3 Mod. 161 ; 1 Show. 68 ; S. C. ; 1 Rol. Ab. 91 ; *Medina v. Stoughton*, Salk. 210 ; Ld. Raym. 593, S. C. ; (both cited by Buller, J., 3 T. R. 57 ; 2 Steph. C. 126). In Cro. Jac. 474, the court say of the defendant, " the sale of goods which were not his own, but affirming them to be his, *knowing* them to be a stranger's," is the offence and cause of action ; and see *Harding v. Freeman*, 1 Ro. Ab. 91.

(c) Peake, C. N. P. 94, cited 3rd edit. of Chitty on Contracts, 449.

(d) *Winn v. Ingilby*, 5 B. & Ald. 625.

third person, who had either not authorized, or had ceased to authorize him to sell them, the buyer has no remedy against him, (a) the weight of modern decision is in support of the strict application of *caveat emptor*. Again, in *Adamson v. Jarvis*, (b) the court say, that a party in the situation of having bought goods which the vendor had no right to sell him, may recover compensation against such seller, although the person who sold them did not undertake [*i.e.*, warrant] that he had a right to sell. They cite *Crosse v. Gardiner*, and *Medina v. Stoughton*, as resting on the principle, that if a man, having that possession of chattels which gives him the character of owner, *affirms* that he is such and thereby induces a man to buy, where, in point of fact, he is not the owner, he is liable to an action without reference to the question whether or not any contract has been broken.

That part of the judgment in *Adamson v. Jarvis*, which places sellers who affirm a title to sell goods, or make representations respecting them, without knowing what they say to be true or otherwise, in the same category with those who affirm on that subject what they know to be false, seems founded on the cases in the note, (c) and was acted on in the House of Lords: (d) and though contrary to two other later cases (e) received strong support in *Fuller v. Wilson*, 3 Q. B. 68, until that case was reversed in error in the Exchequer Chamber 3 Q. B. 1009. In *Fuller v. Wilson*, the owner of a leasehold house, employed an attorney to sell it by auction; the attorney described the house to the auctioneer as producing a clear rent of £100 per annum, free of tenant's rates and taxes. The auctioneer himself became the purchaser, and then discovered that the rent of £100 was liable to deduction for the tenant's rates and taxes.

(a) *Springwell v. Allen*, Aleyn's R. 91, reported more fully in 2 East. 449, note from Mr. Justice Burnett's MSS., and relied on by Littledale, J., in *Early v. Garrett*, 9 B. & Cr. 932; *Denison v. Ralphson*, 1 Ventr. 366; other cases cited 2 East, 449 note; Noy's Max. ch. 42; *Warner v. Tallard*, B. N. P. 30; 1 Ro. Abr. 91. However, whether the true owner has reclaimed makes no difference in the right of vendee to sue, for the buyer is equally a wrong doer to the person whose goods he takes. Cro. Jac. 474; 4 Bing. 73.

(b) 4 Bing. 73; 12 B. M. 241; *Sanders v. Powell*, 1. Lev. 129, also cited, rests on other grounds.

(c) *Pawson v. Watson*, Cowp, 785; *Schneider v. Heath*, 3 Camp. 506.

(d) *Humphreys v. Pratt*, 5 Bligh, 154; 2 Dow. & Cl. 218; and see Lord Abinger's observations in 6 M. & W. 380.

(e) *Freeman v. Baker*, 5 B. & Ad. 805. *Cornfoot v. Fowke*, 6 M. & W. 353.

The owner had made no representation whatever on the subject of the rates and taxes, and the attorney who made it, did not know it to be false, but the court held that the purchaser could maintain an action for the false representation of the value against the owner, and recover the excess of the purchase money over the actual value. In reversing this judgment, Tindal, C. J. says, "The immediate cause of the injury sustained by the plaintiff appears to us to have arisen from his own misapprehension of the fact, and not from any misrepresentation or concealment on the part of the defendant. We therefore think, without entering into the question discussed in *Cornfoot v. Fowke*, that the plaintiff's ground of action as stated in his declaration, is not supported by the finding of the jury, and consequently that the judgment of the court below must be reversed."

Lord Holt laid it down in *Medina v. Stoughton*, (*a*) that where a man out of possession of a personal chattel sells it, his bare affirming it to be his, will not amount to a warranty of his title to sell; for there may be room to question it, and *caveat emptor* in such case, to have either an express warranty [viz. at the time of sale], or a good title: but the point was not sub judice in the case; for the declaration averred the defendant's possession of the lottery ticket at the time he sold it to the plaintiff, and Mr. Justice Buller has questioned the soundness of the proposition, (*b*) saying, he could not feel the distinction between the vendor's being in or out of possession, for the thing is in both cases bought of him and in consequence of his assertion; and that if there is any difference the case seems strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. Mr. Justice Buller seems to rest his opinion in part on there being no mention of this dictum of Holt in Lord Raymond's report of the case; but Farresley's account of it in his volume of Lord Holt's decisions agrees with that of Salkeld. Again, the course of pleading in case against a seller for misrepresenting title to goods sold, shews that from

(*a*) 1 Salk. 211, S. C.; Holt's R. (viz. Farresley's Rep. t. Holt), 208), 1 *Ld. Ray.* 593.

(*b*) *Pasley v. Freeman* 3 T. R. 57.

the book of Assize (a) downwards, the seller's possession of the goods has been always averred as well as his affirmation of his title to them; it was so averred in *Medina v. Stoughton*, and in Lord Raymond's report of it, relied on by Mr. Justice Buller, Gould, J. is stated to have said that he drew the declaration in *Cross v. Gardner*, 3 Mod. 261, &c., "and yet he purposely shewed a possession of the bullocks, as the queries turned on that difference." In *Rowsell v. Vaughan*, (b) the judgment of Tanfield, J. altogether supports Lord Holt's opinion; for though he may there be thought to lay down the law as to caveat emptor on the sale of titles (being an interest in land), more in favour of the vendee than it might be held now, by giving weight to the vendor being out of possession; he says expressly it is no more than if one should sell a horse whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys," and there is no reason that he should have a remedy by the law where he did not provide it for himself. Again, it is held that a debt due from a broker to a purchaser of goods which the broker has sold without authority in his own name cannot be set off by the purchaser in an action against him for their value by the true owner, who consequently may recover it. That decision turns on the fact that a broker not having the possession of the goods he assumes to sell, the vendee cannot be deceived as to his title by that circumstance.

Thus, in *Barring v. Corrie*, (c) Coles and Co. were brokers, employed by Barings Brothers to sell them sugars lying in the name of their partner Deacon, in the West India Dock. Coles and Co. sold them, not on account of Barings Brothers; but in *their own names*, and not in market overt. They became bankrupts, and Barings sued Corries, the buyers of the sugars for the value. They set up a debt due to them from Coles and Co. by way of set off, but failed to establish it; for as Coles and Co. were not in possession of the sugars or of the indicta of property, nor of the delivery order, the defendants as vendees could not be deceived by that circumstance, and were bound to make inquiries whether they acted as brokers or not,

(a) Temp. Ed. III. pa. 42; Assize pl. 8, cited Cro. Jac. 197.

(b) Cro. Jac. 197.

(c) 2 B. & Ald. 137.

in default of which they were liable for the value to the true owners; the plaintiffs or their agents exceeding their authority by selling in their own names. The truth is, that in all cases of sales of goods out of market overt, (a) the rule of caveat emptor applies. This decision supports the dictum of Lord Holt in *Medina v. Stoughton*, and seems to have left Corries without remedy against Coles & Co. for deceit, though it was open to them to prove Coles & Co.'s acceptances under their commission.

Having thus viewed the maxim of caveat emptor in its construction as to sales of *goods*, we may add that it undoubtedly applies to the vendor's title on the sale of a freehold interest in *lands*, and this, whether he is in or out of possession, for as he cannot have them without a title, the buyer is to see it at his peril. (b) Thus, if a regular conveyance is made containing the usual covenants for securing the buyer against the acts of the *seller* and his ancestors only, and his title is actually conveyed to the buyer, the rule of caveat emptor applies against the latter: so that he must at his peril perfect all that is requisite to his assurance; for as he might protect his purchase by proper covenants, none can be added. (c) In the leading case on the subject, (d) on administrator found among the papers of his intestate a mortgage deed purporting to convey premises to him, and without arrears of interest. Not knowing it to be a forgery, he assigned it, covenanting, not for good title in the mortgagor, but only that nothing had been done by himself for the deceased mortgagee to encumber the property; and as this precluded all presumption of any further security, the assignee was held bound to look to the goodness of the title, and failed to recover the purchase-money. But the case of a mortgage differs from that of a sale of land, or, as it seems, of a mere assignment of a mortgage, for such mortgagor or assignor covenants that at all events he has a good title.

(a) See article on *Ignorantia Legis non excusat*, *Law Magazine*, Feb. 1842

(b) See *Per Lord Holt in Medina v. Stoughton*, 1 Salk. 211; 3 T. R. 56, 64; Dougl. 655; Cro. Jac. 196.

(c) See last note, and 5 Coke, 84 a; 4 Coke, 26 a; 2 East, 323.

(d) *Bree v. Holbeck*, Dougl. 655, as remarked on by Gibbs, C. J., in *Jones v. Ryde*, 1 Marsh. R. 163; by Lord Alvanley, C. J. in *Johnson v. Johnson*, 3 B. & P. 170; by Lord Kenyon, in *Cripps v. Reade*, 6 T. R. 606.

Mutual error in vendor and purchaser as to the title to land prevents the operation of caveat emptor. Letters of administration were taken out, in which, as it afterwards appeared, the christian name of the intestate was mis-stated. The administratrix, supposing herself the legal representative of the intestate, sold his interest in certain premises under a parol agreement for sale, and without regular conveyance, both parties being under misapprehension as to her title to sell. The administration was afterwards repealed for the defect above mentioned, at the instance of a third person, who took out fresh administration. The buyer was suffered to recover his purchase money, having been thus paid under a mistake (*a*)

Caveat emptor applies to mere exaggerated representations of the value of land; these, though false, will not be available against the vendor, unless perhaps in the instance of a false statement of the rent at which it is let; in which case relief will be granted to the buyer, even though he has inquired the actual rent, for there may be no written lettings, and the tenants may refuse to disclose their rents, or may mis-state them by collusion with the landlord. (*b*) The instances in which a court of equity has relieved a vendee seem to be principally those where his certain profit has been mis-stated to him. And it lies on the injured party to show, first, that the fact as represented is false, and next that the party making the representation had once knowledge of a fact contrary to it; for the forgetting that adverse fact is no defence. (*c*) And where on the sale of fixtures, and fitting up of a public house, a misrepresentation as to the business was made, the sale was held to be avoided thereby, although by the agreement the good will was expressly excluded. *Hutchinson v. Morley*, 7 Scott 341.

If a third person not interested in the property to be sold, fraudulently, and with intention to deceive, makes a statement to the vendee respecting its value or rent, for the consequences of which statement, if made by the owner himself, he would have been liable, the same remedy is open to the

(*a*) *Cripps v. Reade*, 6 T. R. 606.

(*b*) See Sugden's Vendor's, Introduction. *Robinson v. Musgrove*, 2 M. & Rob. 113.

(*c*) *Burrows v. Lock*, 10 Ves. 470, Sir W. Grant, M. R.

vendee against the party guilty of the misrepresentation, and his motives in making it are not material. (a)

The maxim "*Vigilantibus et non dormientibus jura subveniunt*," is near akin to caveat emptor, and is one of those rules too, in which equity follows the law, (b) but it only governs the subject, the rule for the sovereign being contrary, viz., "*Nullum tempus occurrit regi*," which is "the king's plea, except it be in some trifle, as usurpation and death on his lapse or the like; (c) the reason of which seems to be, that as the pecuniary affairs of a reigning sovereign are necessarily in the hands of his officers and servants, their neglect or possible combination with adverse parties shall not defeat his just title." But the general policy of the law is, that the using of legal diligence is always favored, and shall never turn to a creditor's disadvantage; (d) while those who by crassâ negligentia in slumbering over their rights betray those on whom they may have claims into false security, and it may be, into a larger expenditure than they would have otherwise ventured on, shall be content to lose that assistance from the laws which a more active pursuit of their legal rights would have insured them.

In the case of bankrupts, viz., *Smith v. Mills*, 2 Rep. 26 b, decided eighteen years after the passing of 13 Eliz. c. 7, it was resolved that a commission of bankrupt was matter of record, whereof as every vigilant person *may* take cognizance, so those creditors who from obstancy or carelessness neglected to come before the commissioners and pray the benefit of that act, lost it; "for vigilantibus et non dormientibus jura subveniunt," as otherwise a debt might be concealed, or a creditor might absent himself, and so avoid all the proceedings of the commissioners by force of that act. This passage was cited, and with success, in *Brooks v. Sowerby* (e) to show that *may* should be construed "*must*;" and the Court accordingly held that the issue of a commission of bankrupt was of itself sufficient notice to the world of a prior act of bankruptcy having been committed, so as to make

(a) Sugden's Vendors, ubi supra.

(b) Sugden's V. & P. 2.

(c) *Sheffield v. Ratcliffe*, Hobart's R. 347, cited 5 Bac. Abr. 562, tit. Pre-rogative (E. 6.)

(d) *Cox v. Morgan*, 2 B. & P. 112.

(e) 3 Barley Moore's Rep. 157; see also the report in 8 Taunt.

a payment to the bankrupt after the commission issued a payment in the party's own wrong, though he had no knowledge of the act of bankruptcy. But this decision was reversed in error. (a)

At common law executions had priority over all debts which were not specific liens, including rent in arrear to a landlord; till by statute 8 Ann. c. 19, the parliament gave him a remedy for one year's rent, but for no more, because *vigilantibus et non dormientibus*, &c. (b)

Sir Andrew Corbet devised lands to Richard Corbet and others, to hold till 800*l.* should be levied by them thereout, above all charges, that sum to be employed for the preferment of his two daughters, Margaret and Mary. At his death in 25 Elizabeth, his son and heir Robert possessed himself of the will, and received the profits of the lands devised, amounting in all to 640*l.* during his life, without, as it seems, Richard Corbet knowing of the will. At Sir Andrew's death, five years after, his will was found in his house at Moreton Corbet, Shropshire, and the devisee Richard, who had not had notice of it before, entered on the lands and took the profits. The main question was, whether the 640*l.* should be reckoned part of the rents so to be received. The court resolved, *inter alia*, that if a stranger had occupied the lands, the devisee would be bound to take notice of the devise at his peril; for *vigilantibus et non dormientibus*, &c. (c)

At common law, if an heir did not procure an office to be found by writ or commission at his suit, he could not have a general livery of his lands granted to him: for in such case an office would be found by the king's escheator, *virtute officii*, on which the heir could not sue out of his livery, for *vigilantibus*, &c. (d).

A judgment obtained without malpractice in one term, though by negligence of a party or his attorney, cannot be examined or defeated by the court on a subsequent term, for *vigilantibus et non dormientibus*, &c. (e)

(a) 4 B. & Ald. 523; see now 6 Geo. IV. c. 16, s. 82; 2 & 3 Vict. c. 29.

(b) Pratt, C. J. *Hinchett v. Kimpson*, 2 Wils. 146.

(c) Corbet's case, 4 Coke, 82 b; see *Saunders v. Carvel*, Palm R. 164; *Thomason v. Mackworth*, Sir O. Bridgm. R. 502.

(d) 2 Inst. 690.

(e) *Webb's case*, Palm R. 157.

“*Volenti non fit injuria.*”—One great class of cases which illustrate this principle, is that in which the question is whether payments were made voluntary, *i. e.* against the party's interest, or at his risk and in his own wrong, or were compulsory on him; *e. g.* in order to redeem his person, (or, as it seems for this purpose, his *goods*,) (*a*) or by coercion of legal process, distress, &c.; such payments being irrecoverable in the first case, but recoverable in the latter. (*b*)

Where a workman who was employed to make an engine was so dilatory, that when completed it was useless to his employer, who afterwards attempted to recover back from him sums paid on account during the progress of the work, still as they had been made with full knowledge or means of knowledge of the state of the work, the court held that they could not be recovered on the ground of want of consideration, for as the payments were voluntary, they must consequently be taken to have been properly and legally made. (*c*)

The rule has always been that if a person pays voluntarily, *i. e.* without coercion of legal process, money which, if he had resisted an action brought to recover it, he might not have been compelled to part with, but which in equity and conscience he ought to liquidate, *e. g.* a just debt barred by the statute of limitations, or contracted during infancy, a court of law will not assist him to recover it again in the equitable action of money had and received; (*d*) and this, as it seems, on the ground of the payment having been voluntary. Nor is there any precedent in equity of such a bill. So if the payment was made by compulsion of legal process, there seems nothing on which the jurisdiction of a court of equity could attach in order to grant relief; for

(*a*) Webb's case, Palm. R. 157.

(*b*) Fulham v. Down, 6 Esq. 26, note, cited 4 Ad. & E. 862, by Patterson J.; but see Skeate v. Beale, 11. Ad. & E. 983; thus stated in Ashmole, v. Wainwright, 2 G. & D. 224 (Hil. 1842), by Coleridge, J., “A defendant sought to avoid a written agreement to pay a sum of money, by showing that he had been induced to enter into it for the purpose of recovering his goods which had been wrongfully distrained; but the court held duress of goods not such a constraining force as to avoid the agreement.” There is no distinction quoad hoc between a deed and an agreement not under seal; Skeate v. Beale.

(*c*) Cartwright v. Rowley, 2 Esp. N. P. C. 723 (sometimes cited as 1 Espinasse).

(*d*) Per Lord Mansfield, C. J., Bize v. Bickason, 1 T.R. 286; S. P. per De Grey, C. J. 2 Bla. R. 825.

the matter is solely cognizable at law, though, before verdict, a court of equity would grant a discovery in aid of that remedy. (a)

Payment means payment in due course, and not by anticipation. (b) Thus payment of rent before the *day* on which it is due is a voluntary payment, and will accordingly sometimes entail on the tenant the liability of paying the whole over again to some other person, *e. g.* a reversioner or remainderman, who by the death, &c., of the party to the money was paid, has become entitled to it before or at the time at which it became due. (c) But though rent is not due till sunset of the day on which it is reserved, that being the point of time when by law it ought to be paid, and before which at the earliest no remedy can be taken against the lessee, still if on the *morning* of that day the tenant pays his rent to the lessor, who dies before noon, this payment, though voluntary as being made before sunset, is good against the heir and all but the crown. (d)

The law allows no fraction of a day except for the purposes of justice. (e)

The general doctrine is, that money paid quasi by compulsion in order to redeem a man's person, or obtain possession of goods wrongfully withheld from him, either where nothing is due in respect of them, or where though something is due, more than the fair charge has been claimed, may be recovered as money had and received to the plaintiff's use; (f) for unless the parties are on equal terms the payment could not be voluntary. Thus where one had the power of saying to the other, "What you require shall not be done except on conditions I choose to impose:" as where borough justices refused to renew an ale-house license except on receiving a

(a) So argued successfully before Lord Eldon, Ch., *Kemp v. Pryor*, 7 Ves. 242; see *Barbone v. Brent*, 1 Vern. 176; also 4 Ad. & E. 862; 10 Ad. & E. 85, 86.

(b) Lord Ellenborough in *Burbridge v. Manners*, 3 Camp. 193; see 3 B. & P. 602.

(c) *Plowd. Comm.* 172 a; *Bellasis v. Cole*, cited 1 P. W. 179.

(d) See *Lord Rockingham v. Penrice*, 1 P. W. 177; and see 11 Geo. 2, c. 19, s. 15; *Clun's case*, 10 Co. 127 b. Quære, if lessor die after sunset and before midnight, 1 P. W. 178; 1 Saund. 287, 288 c; *Morris v. Harrison*, 2 Maddock's R. 268.

(e) See 11 Ad. & E. 859; 4 Ad. & E. 263; 9 B. & C. 603, &c. &c.

(f) See per Holroyd, J. in *Shaw v. Woodcock*, 7 B. & Cr. 85; and *Fulham v. Down*, 6 Esq. 22 n; cited 4 Ad. & E. 862.

fee unsanctioned by prescription or statute, the sum thus extorted was recovered as received to the use of the party imposed on. (a) Again, where as in *Hill v. Street*, (b) the defendant, a broker, was in possession of goods under a distress for seven quarters' rent, six only being due, but under fear of a sale, the plaintiff requested him not to sell, and promised to pay, and did pay his expenses, it was held that as the undertaking was given under the apprehension that the sale would proceed if the demand was not complied with, it was impossible to hold the payment voluntary, and the plaintiff recovered all that had been so paid improperly.

Astley v. Reynolds (c) is the leading case on this subject, and has never been impugned; it establishes that where more money than is due is extorted by duress of goods, the party after tender of what is really due may sue for the residue as for money had and received. There plaintiff, having pawned plate, tendered the pawnee more than legal interest for its redemption, but being obliged to pay a still higher sum in order to obtain it, sued him for the surplus as for money had and received to his (the pawnor's) use. For the defendant it was argued, that as the plaintiff paid neither by mistake, force, or deceit, the maxim "*Volenti non fit injuria*" applied; but the court gave judgment for the plaintiff, holding the payment compulsory, for the plaintiff might want his goods so immediately that an action of trover would not answer his purpose; and the maxim cited applies "where the party had the freedom of exercising his will, which this man had not. We must take it he paid his money [to redeem his goods] relying on his legal remedy to get it back again."

It seems that unless the party who pays must be taken to know what is really due, no tender of money need be made; this doctrine has been lately canvassed in *Ashmole v. Wainwright* and another. (d) The defendants were warehousemen

(a) *Morgan v. Palmer* 2 B. & Cr. 734.

(b) 5 Bing. 37.

(c) *Stra.* 915, *Mich.* 5 *Geo. II.* as cited by *Patteson, J.*, in *Ashmole v. Wainwright* (*Hil.* 1842), 2 *G. & D.* 219.

(d) However unless the plaintiff could tell or judge what was due, how could he be held liable to make a tender? see *S. C. arguendo*. In *Astley v. Reynolds*, *Stra.* 915, the pawnor of the plate who tendered a sum as due for interest was bound to know the rate of interest established by statute.

in London, whose van, having conveyed furniture into the country, was about to return empty, when, without any express bargain for the price of carriage, the plaintiff, a farmer, placed furniture in it to be carried to London, and it was accordingly carried to the defendants' warehouse there. The defendants refused to part with it till five guineas were paid for carriage and warehouse room. The plaintiff's attorney then applied for the goods, and after saying first that the defendants were not entitled to charge anything, and next that they had charged too much, paid the whole sum demanded under protest, and took away the goods. The farmer then sued the warehousemen for the five guineas as money had and received to his use by them, stating by his particulars that it had been paid under protest that he was not liable to pay "the same or *any part* thereof, or if liable to pay *some part thereof* that the claim of five guineas was exorbitant." The plaintiff at the trial set up that he was not liable to pay anything, but the defendants gave contrary evidence, and the jury found he was to pay something, and fixed the amount at 1*l.* 10*s.* 6*d.*; plaintiff was nonsuited for not having tendered to the defendants what was really due, but the court ordered a new trial, saying, that both parties had been in the wrong, as appeared by the finding: the plaintiff in contending that he was not liable to pay anything, and the defendants in not demanding from him what was really due; but that as the plaintiff had not in his particulars entirely denied that anything was due, but averred that the plaintiff, if liable at all, was not liable for so much, as the defendants had money of his in their hands, (a) viz. the 3*l.* 9*s.* 6*d.* overpaid, he was entitled to recover that, not having any remedy by replevin, as in *Lindon v. Hooper*, (b) where money was paid for release of cattle wrongfully distrained quasi

(a) As to this test see 1 B. & Ald. 129; 1 M. & S. 610.

(b) *Cowper*, 414; and see *Knibbs v. Hall*, 1 Esp. N. P. C. 84; (cited by Lawrence, J. 3 B. & P. 520, and per Cur. 11 Ad. & E. 988, 991.) In *Knibbs v. Hall*, a landlord and tenant had agreed for a farm at twenty guineas a year, but the former threatened to distrain for twenty-five guineas, which the tenant paid. It was held that as no absolute coercion was practised, and the tenant *might at all events have replevied*, the sum overpaid could not be recovered back, and see *Lindon v. Hooper*, *Cowp.* 414, as cited 5 Bing. 49; But in *Fulham v. Down*, 6 Esp. 26, note, Lord Kenyon qualified this doctrine where the overpayment is made "to redeem or preserve your person or goods," cited 4 Adol. & E. 862, by Patteson, J.

damage feasant. Patterson, J. guarded himself from going so far as to say, that where the party withholding goods demands money before giving them up, and the owner says, "I owe you nothing for them, and will pay you nothing." but afterwards pays the whole sum demanded, he may sue for the overcharge as money had and received, though he did not tender what was due. (*a*)

When a tenant in possession pays sums which are due from his landlord in respect of the demised premises, e. g. property or land-tax, ground rent, annuity, or rent charge, mortgage interest, sewers, paving or drainage rates, &c., whether on demand by the party entitled to claim them, without waiting for actual distress, (*b*) or on compulsion by distress, &c., it is a payment on account of any rent then due but unpaid, (*c*) or of that growing due, and which shall next become payable to his landlord; (*d*) and if the tenant gets time to pay the tax, &c., even that makes no difference, as he continues liable to distress. (*e*)

But if, without thus deducting the amount, he pays the whole rent then due or afterwards accruing due, his remedy to recover it will be at an end; for such a payment, after his previous disbursements on account of his landlord will, in general, (*f*) he held a voluntary payment of their amount; accordingly he will not be permitted to recover it from the landlord or even to unravel the transaction for the six years allowed in other cases of payments on account. Thus in *Denby v. Moore*, (*g*) the tenant had paid the landlord's property tax, and afterwards for twelve years the full rent, without making the deduction directed by 46 Geo. III c. 65,

(*a*) 2 G. & D. 217.

(*b*) See per Holroyd, J. *Denby v. Moore*, 1 B. & Ald. 130; *Carter v. Carter*, 5 Bing. 499; *Sapsford v. Fletcher*, 4 T. R. 513; *Taylor v. Zamira*, 6 Taunt. 524. (cited 9 B. & C. 256; 9 Ad. & E. 809; *Johnson v. Jones*.) *Stubbs v. Parsons*, 3 B. & Ald. 516.

(*c*) *Stubbs v. Parsons*; and per Abbott & Holroyd, Js. in *Denby v. Moore*, 1 B. & Ald. 130; see 1 M. & S. 610, S. P.

(*d*) *Carter v. Carter* and others, 5 Bing. 407; 2 M. & P. 723, S. C.; *Hills v. Street*, 5 Bing. 37.

(*e*) *Ibid*.

(*f*) See exceptions put by Abbott, C. J., 1 B. & Ald. 130, as to fixing landlord with knowledge of the tenants having paid, by producing receipts, &c., 1 M. & S. 609; 5 Bing. 407.

(*g*) 1 B. & Ald. 133, *Replevin*.

Sch. (A.) No. 4. Rule 9. In *Stubbs v. Parsons*(*a*) and *Spragg v. Hammond*,(*b*) tenants had paid land tax for six years, without deducting it from time to time out of their rents, as directed by 38 Geo. III. c. 5. s. 17, but the court would not permit them to set up the amount paid, or any part of it, in support of a replevin brought on the landlord's distress for after accruing rent of equal or less amount, or to recover the amount as money paid by the tenant to the use of the landlord, or received by him to the tenant's use. (*c*)

Andrew v. Hancock (*d*) was an action of replevin, in which the landlord avowed for six months' rent in arrear. The plea in bar was, that plaintiff had held the premises tenant to the defendant, and in order to avoid a distress, had, for six successive years past, paid annual sums for land tax and paving rates, which sums, taken together, exceeded the amount distrained for. On demurrer to the plea in bar it was held bad; for as it disclosed that the tax and rates had not been deducted by the plaintiff from the rent of the *current* year, the whole payments were voluntary, and could not be relied on as a ground for replevying, or as a set-off to the half year's rent distrained for; and the avowant, the landlord, had judgment.

The result of these decisions is, that if a landlord refuse to allow the deduction to which his tenant is thus entitled, when claimed by him out of any rent due and unpaid at the time of the payment of the tax, &c., or out of the then growing rent, when due, and distrains for the whole amount of rent, the tenant should, without delay, bring an action on the case for excessive distress, (*e*) or, waiving the tort, follow up his claim forthwith by suing in assumpsit for so much money paid by him to his landlord's use, or had and received by the latter to his, the tenant's use. (*f*)

If by payments made on account of rent after it had become

(*a*) 3 B. & Ald. 516, Replevin.

(*b*) 4 B. M. 431; 2 Br. & Bing. 59, S. C. Assumpsit for money paid.

(*c*) *Spragg v. Hammond*, decided in C. P. a few days after *Stubbs v. Parsons*, in K. B. The dicta of Bayley v. Holroyd, Js., to the contrary, in that case were cited in *Spragg v. Hammond*. See also *Sanderson v. Hanson*, 3 C & P. 214.

(*d*) 1 Br. & B. 37; 3 B. M. 278, S. C. See a drainage rate case, *Dawson v. Linton*, 5 B. & Ald. 521.

(*e*) *Carter v. Carter*, 5 Bing. 406.

(*f*) *Graham v. Tate*, 1 M. & S. 609, as approved and stated in *Spragg v. Hammond*, 2 Brod. & B. 59. See per Burrough, J., 6 Taunt 529.

due, the tenant has reduced the amount still owing to a sum equal or below that which he has also paid for the land tax or other like burden, and the landlord distrains for the whole or residue of the rent due, the tenant may safely replevy, (a) but if any rent remains due after such deduction, it seems he cannot. (b) If the rent is reserved, payable at periods recurring so often that the property or other tax paid by the tenant exceeds the *next* rent due from him, he may, we apprehend, still deduct it from the rent afterwards due. (c)

But where upon an agreement of demise by the plaintiff to the defendant, at a certain rent clear of land tax and all parochial taxes, for which by a local act the landlord or receiver was also made liable, the defendant having paid the rent and quitted, leaving the land tax and parochial taxes unpaid, which having been distrained for the plaintiff had paid, the court held that the remedy was upon the special agreement, and that he could not maintain the action for money paid to the defendant's use, the latter not being liable to pay the money to any one but the plaintiff, and that by virtue of his agreement. (d)

CASES IN THE ENGLISH COURTS.

HARRISON v. DIXON.

1 Dowl. & Lown. 454.

To trespass for seizing the plaintiff's goods, the defendant pleaded that C. recovered a judgment against F., and sued out a fieri facias directed to the defendant as Sheriff, and commanding him to levy on the goods of F., by virtue of which writ, the defendant seized and took the goods of F. in execution, *quæ sunt eadem*. Held, bad. In trespass, *de bonis asportatis*, a plea denying that the goods are the plaintiff's puts in issue the property in, as well as the possession of, the goods.

Trespass for seizing and taking certain goods, cattle, chattels, and effects of the plaintiff.

Plea : that before the said time when, &c., to wit, on &c., one T. Cooper recovered against one J. Ford, in the Court of our Lady the Queen, &c., by the consideration and judgment of the said court, a certain debt of 60*l.*, and also 48*l.* 10*s.* costs, which in and by the same Court were adjudged to the

(a) Taylor v. Zamira, 6 Taunt. 524.

(b) Carter v. Carter, *ubi supra* ; Sapsford v. Fletcher, 4 T. R. 511.

(c) See 3 B. & Ald. 520.

(d) Spencer v. Parry, 3 Ad. & El. 331.

said T. Cooper, and with his assent, for his damages which he had sustained, as well by occasion of the detaining of the said debt, as for his costs and charges, by him about his suit in that behalf expended, whereof the said J. Ford was convicted (*prout patet per recordum*). That afterwards, and before the said time when, &c., to wit, on &c., the said judgment then being in full force, and the said debt and damages remaining unpaid and unsatisfied, the said T. Cooper, on the 10th day of April, in the year of our Lord, 1843, for the obtaining satisfaction thereof, sued and prosecuted out of the said court of our Lady the Queen, &c., a certain writ of our said Lady the Queen, called a *feri facias*, directed to the sheriff of Cheshire, by which said writ our said Lady the Queen commanded, that of the goods and chattels of the said J. Ford, in the said sheriff's bailiwick, he should cause to be levied the debt and damages, as aforesaid, and that he should have that money before our said Lady the Queen, at Westminster aforesaid, immediately after the execution thereof, to render to the said T. Cooper, for his damages aforesaid, and that the said sheriff should have there then that writ, which said writ afterwards and before the delivery thereof to the said sheriff as hereinbefore mentioned, to wit, on &c., was duly indorsed with a direction to the said sheriff to levy 108*l.* 10*s.*, with interest thereon, as in the said writ mentioned, besides 1*l.* 10*s.* for *feri facias* and warrant; also sheriff's poundage, officers' fees, and all other incidental expenses, and which said writ so indorsed, afterwards, and before the said execution thereof, to wit, on, &c., was delivered to the now defendant, who then and from thence, until, and at and after, the execution of the said writ, was sheriff of the said county of Chester, to be executed in due form of law, by virtue of which said writ, the defendant, so being sheriff of Cheshire aforesaid, afterwards, and before the return of the said writ, and at the said time when, &c., did seize and take in execution the said goods and chattels of the said J. Ford, for the purpose of levying the moneys so directed to be levied by the said indorsement on the said writ, and by the said warrant, as aforesaid, and did then, by sale thereof, levy a certain sum of

money, to wit, the sum of 100*l.*, part and parcel of the debt and damages, costs and charges aforesaid, as he lawfully might for the cause aforesaid, which are the said several alleged trespasses whereof the plaintiff hath above thereof complained against the defendant, and this the defendant is ready to verify, &c.

Special demurrer, assigning for cause, that the said plea amounts to the general issue, or to an argumentative traverse, that the goods and chattels in the declaration mentioned, were the goods and chattels of the plaintiff, and gives no colour of title to the plaintiff, and should have been pleaded by way of a direct denial that the said goods and chattels were the plaintiff's at the said time when, &c. And also for that the allegation in the plea that the defendant did seize and take in execution the said goods and chattels of the said J. Ford, is unintelligible and ambiguous, inasmuch as no particular goods and chattels of the said Joseph Ford are previously mentioned in the said plea or declaration; and if the defendant means thereby that he took the goods and chattels in the declaration mentioned, he should have averred directly that they were the goods and chattels of J. Ford, at the same time when, &c., and for that the averment in the plea, "which are the said several alleged trespasses, which the plaintiff hath above thereof complained," is repugnant to and inconsistent with the foregoing allegations of the plea, or is at least only an argumentative and not a direct allegation that the goods and chattels in the declaration mentioned, were the goods and chattels of the said J. Ford, and also for that the said plea does not traverse nor confess and avoid the trespass as to the cattle or effects in the declaration mentioned, nor even as to the goods and chattels therein mentioned, and leaves the declaration wholly unanswered, as to the trespasses to the cattle and effects therein mentioned.

Welsby, in support of the demurrer, was stopped by the Court, who called upon

Atkinson, to support the plea. The question as to whether this plea is good by way of confession and avoidance, will depend upon the effect of the plea of "not possessed." The goods seized were the goods of Ford, in the possession of the

plaintiff, and the plea concludes with an averment of “*quæ sunt eadem.*” [Lord *Abinger*, C. B.—That is a contradiction: the defendant says that he seized the goods of another man, which is the same seizure as the plaintiff complains of.] In an action of trespass, the plea of “not possessed,” does not put in issue the property in the goods, but only the fact of possession, consequently, in the present case, the plaintiff must have succeeded upon that plea, for he had the possession, though the property was in another. The effect of the plea of “not possessed,” was fully considered by the Court of Queen’s Bench, in the late case of *Whittington v. Boxall*, (*a*) that was an action of trespass for breaking and entering the plaintiff’s close, called the garden, and gathering fruit, to which the defendant pleaded, that the close, trees, and fruit, were not the property of the plaintiff, and the Court, after consideration, held that the plea put in issue the possession only, and not the title to the close. [*Parke*, B.—Then there are two contradictory decisions upon the point; that case is at variance with *Purnell v. Young*. (*b*) But in truth *Whittington v. Boxall* has no application to the present case; here, the only question is, whether it is any justification for taking the plaintiff’s goods to shew that a writ issued against the goods of another person?] It is conceded that if *Purnell v. Yonge* be law, the present plea cannot be supported, but that case must be considered as overruled by *Whittington v. Boxall*. *Parke*, B.—The defendant should have denied that the goods were the goods of the plaintiff. The doctrine of the Court of Queen’s Bench in *Whittington v. Boxall* is applicable to land and not to goods. In what way can a party dispute the plaintiff’s right as to goods, except by denying his possession? There is no plea of *liberum tenementum*. The Court of Queen’s Bench and this Court have certainly decided differently on the same point, but, nevertheless, there is every distinction between trespass to land and goods; with regard to the latter, there is no other plea; as to the former, the Court of Queen’s Bench says, that there must be a special

(*a*) T. T. 1843. 7 Jurist, 722.

(*b*) 6 Dowl. 367, O. S.; S. C. 3 M. & W. 288.

plea in order to dispute the plaintiff's title. We have thought differently. Before the new rules, the general issue put in issue the plaintiff's title, because, under that plea, the defendant might dispute the fact of the trespass, and also that the trespass was committed on the plaintiff's close. Now the plea denying the close to be the plaintiff's, is a denial of the plaintiff's title to the close to the same extent that he would before have been obliged to prove it under the general issue. Here the allegation is, that the defendant took the plaintiff's goods; if they are not the plaintiff's goods, the defendant should have traversed that allegation.

PER CURIAM. (a)—There must be judgment for the plaintiff.

Judgment for the plaintiff.

Doe dem. FELLOWES and Others v. ALFORD.

I Dowl. & Lown. 470.

Where a defendant in ejectment, was described in the consent rule as "landlord," but it appeared at the trial that he defended as owner of the premises: Held, that he was not precluded from shewing that a third party was tenant to the lessor of the plaintiff.

Ejectment to recover possession of a messuage, school house, &c., at Chawleigh, in the county of Devon.

At the trial before *Coleridge, J.*, at the last Devonshire Assizes, it appeared that the plaintiffs were trustees of the school in question, and that the defendant, who was the school-master, claimed a freehold by virtue of his office. The plaintiffs had dismissed the defendant from his situation for some alleged misconduct, and had let the premises to one Baker. In the years 1840 and 1841 the plaintiffs gave Baker two separate notices to quit, but subsequently distrained upon him for rent. By the consent rule, it was ordered that S. Alford be made a defendant instead of the now defendant Richard Roe, and that he should receive a declaration in an action of ejectment for the premises in question, "now in the possession or occupation of the said S. Alford, for which he intends as landlord, to defend this action of trespass and ejectment." Under these circumstances, it was submitted, that as a tenancy was proved to be outstanding in Baker, the plaintiffs

(a) Lord Abinger, C. B., Parke, B., Gurney B.

ought to be nonsuited. The learned judge being of that opinion, directed a nonsuit accordingly.

Cockburn now moved to set aside the nonsuit or for a new trial. The defendant is estopped by the consent rule, in which he is described as landlord, from setting up the title of another, but must rely solely upon his own title. Where a party defendant as landlord, and the occupiers of the premises had suffered judgment by default, it was held, that he could not object that they had received no notice to quit from the lessor of the plaintiff. *Doe dem. Davies v. Creed.*(a) The same principle was recognised in *Doe dem. Wawn v. Horn.* (b)

PER CURIAM.—There is no ground for a rule. It is evident from the facts proved, that Alford meant to defend as owner and not as landlord. The word “landlord” has been inserted by mistake in the consent rule, and may be rejected as surplusage.

Rule refused.

PIM and Another v. REID and Others.

1 Dowl. & Lown. 512.

Where the plaintiffs upon the trial of a cause had obtained a verdict upon some issues, and the defendants upon others, which went to the whole cause of action, and no damages were assessed, but the plaintiffs afterwards had judgment, non obstante veredicto, upon the pleas, on which the defendant had succeeded. Held that the plaintiffs were bound to take the risk of issuing a writ of inquiry to assess damages upon themselves, and the Court would not make absolute a rule, calling on the defendants to show cause why a writ of inquiry should not issue.

At the trial of this cause before *Tindal*, C. J., at the Guildhall Sittings, after last Hilary Term, the plaintiffs had a verdict upon the first five issues, and the defendants upon the sixth and seventh issues. In Easter Term a rule nisi was obtained, which was made absolute in the course of the present Term, to enter up judgment for the plaintiffs upon the sixth and seventh pleas, non obstante veredicto. No damages were assessed for the plaintiffs on the trial, as the issues found for the defendants went to the whole cause of action. A rule having been afterwards obtained, calling upon the defendants to shew cause why a writ of inquiry should not issue to assess the damages sustained by the plaintiffs.

(a) 5 Bing. 327 ; S. C. 2 M. & P. 648.

(b) 3 M. & W. 333

Manning, Serjt., now shewed cause against it.

Channell, Serjt., contra.

PER CURIAM.—The plaintiffs are bound to take the risk of issuing the writ of inquiry upon themselves, without applying to the Court.

Rule discharged.

MOULSTON V. WIRE AND ANOTHER.

1 Dowl. & Lown. 527.

Service of a notice of declaration on one of two joint defendants, who are partners, at the partnership place of business, is not a sufficient service upon the other. Quære, whether the service would be sufficient, if it appeared that the subject matter of the declaration related to a partnership debt.

A rule had been obtained on the part of Grindley, one of the defendants, to set aside the interlocutory judgment which had been signed in this case, and for a stay of proceedings, on the ground of irregularity, with costs. The affidavits stated that the defendants, Wire and Grindley, carried on business as partners at Newington Causeway, in the county of Surrey; and that the defendant Wire was served with two copies of the notice of declaration, (one of which he was told to give to his partner), by delivering them to him personally at the said place of business.

Bompas, Serjt., shewed cause. The question is, whether the service of a notice of declaration on one of two joint defendants, being partners, at the partnership place of business, is a sufficient service. [*Maule*, J.—The affidavit does not say in terms that the subject-matter of the declaration related to a partnership debt.] It says that they are partners, and therefore it must be taken that the debt was incurred by them as partners. The application is not to set aside the service, but the interlocutory judgment altogether.

Halcombe, Serjt., in support of the rule. The rule was moved on behalf of the defendant Grindley, who has not been served with a notice of declaration. The books of practice lay it down as a strict rule that the plaintiff must serve the notice on each of the defendants. [*Tindal*, C. J.—Must that necessarily be a personal service? No, but the

plaintiff must at all events leave the notice at the defendant's last well-known place of abode, and the affidavits do not state that. It is only said that the service was effected by delivering the copies of the notice of declaration to the defendant Wire personally "at the said place of business."

TINDAL, C. J.—I cannot say that I think this a sufficient service upon Grindley, who might have been abroad at the time. The rule must be absolute to set aside the judgment and stay proceedings as against Grindley; the costs to be costs in the cause.

Rule accordingly.

HEATH and Others v. DURANT.

1 Dowl. & Lown. 571.

Where the terms of a contract are varied by a contemporaneous memorandum, a defence arising therefrom may be given in evidence under the general issue, but if the memorandum was made after the original contract, such defence must be pleaded specially.

Assumpsit on a policy of insurance on the ship *Vertuosa*, from Genoa to the Brazils and Africa. The declaration set out the usual stipulation against taking at sea or arrest, and averred a seizure by the Portuguese government.

The defendant had applied for leave to plead, first, non assumpsit; seventeenth, that at the time of the making the policy and of paying the premium, and in consideration thereof, it was amongst other things mutually agreed and declared between the defendant and the plaintiffs, then being the agents of, &c., that the said policy and the risks therein insured against, or intended so to be, should not be deemed, taken, or understood to extend to or exclude capture, seizure, detention, arrest, restraints, or detainments of any kings, princes, or people, except only in cases of war: Averment, that although the said vessel was arrested, restrained, and detained as in the declaration mentioned, it was not arrested, restrained, or detained in war. Verification.

Eighteenth. That at the time of the making of the said policy, to wit, on, &c., in consideration that the defendant would, at the request of the plaintiffs, as such agents as aforesaid, make and subscribe the said policy, and the plaintiffs as

such agents would pay to the defendant the said premium, it was in and by a certain memorandum, to wit, a certain slip, by consent of the said parties, then annexed to the said policy, and by such consent then made part thereof, declared and agreed between the defendant and the plaintiffs, as such agents, amongst other things, that the said policy should be against and extend to British as well as foreign capture, seizure, and detention, and the consequences of any attempt thereof, but only in case of war: Averment, that the said arrest, restraint and detention of the said vessel was not in case of war. Verification.

Rolfe, B., at Chambers, had refused to allow the two latter pleas, on the ground that the facts therein alleged, might be given in evidence under the general issue.

Erie moved to rescind the order of the learned Judge, and for liberty to plead those pleas. The vessel was seized by the Portuguese government, in time of peace, on the ground that it was concerned in the slave trade. If, therefore, the memorandum mentioned in the plea is to be taken as part of the policy, the defendant is clearly not liable, and the only question is, whether or no the defence may be given in evidence under the general issue. It may be said, at the trial, that as the new rules of pleading have declared that in an action on a policy of insurance, the plea of non assumpsit shall operate as a denial only "of the subscription to the alleged policy," the defendant is not at liberty under that plea to shew that other material stipulations were made on a separate slip, at the time of executing the policy. [*Parke*, B.—If the slip is contemporaneous with the policy, it forms part of it.] It was all one act, and is so pleaded, for the plea alleges, that "at the time of making the said policy, and of paying the premium, and in consideration thereof. [Lord *Abinger*, C.B.—Then the plea amounts to the general issue.] The defendant, in fact, says that he did not subscribe the particular policy set forth in the declaration. [*Alderson*, B.—It may be an agreement in the nature of a policy, but which is proved by two slips of paper.] The application is not made on account of any disagreement with the opinion of the learned Judge, but to avoid expense hereafter.

LORD ABINGER, C. B.—I think the defence is available under the plea of the general issue. It will be a question for the jury, whether or no the slip formed part of the original contract.

PARKE, B.—If after the policy was made, the parties agreed to certain stipulations which waived it, then that would form the subject of a special plea.

ALDERSON, B.—There is no occasion to plead specially, unless the defendant means to shew two things, first, the policy, and afterwards the alterations.

GURNEY, B., concurred.

Rule refused.

EMBLIN V. DARTMELL.

1 Dowl. & Lown. 591.

To assumpsit for money due on account stated, the defendant pleaded that after the statement of the account, the plaintiff drew and defendant accepted a bill of exchange, and delivered the same to the plaintiff, who then accepted and received the same in discharge of the said sum, and endorsed the bill to a certain person unknown to the defendant, who is the holder thereof, and entitled to sue defendant on the same: Replication, that plaintiff did not accept and receive the bill in satisfaction and discharge of the said sum—Held on special demurrer, that the replication was bad, and the plea good.

Assumpsit for money due upon an account stated.

Plea, as to 15*l.* 18*s.* 6*d.*, parcel, &c., that after the statement of the said account, and before the commencement of the suit, to wit, on &c., the plaintiff made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff's order 15*l.* 18*s.* 6*d.*, for value received, two months after the date thereof, and the defendant, at the request of the plaintiff, then accepted the said bill, and delivered the same to the plaintiff who then accepted and received the same in discharge of the said sum of 15*l.* 18*s.* 6*d.*, and then indorsed and delivered the same to a certain person to the defendant unknown, who from thence hitherto hath been and still is the holder thereof, and entitled to sue the defendant upon the same. Verification.

Replication, that plaintiff did not accept and receive the said bill of exchange in satisfaction and discharge of the said sum of 15*l.* 18*s.* 6*d.*, parcel, &c.. *modo et formâ.*

Special demurrer, assigning for cause, that the replication professes to traverse an allegation not found in the plea, namely, that the plaintiff accepted the bill in satisfaction and discharge.

Hurlstone, in support of the demurrer, was stopped by the Court.

Petersdorff, contra. The plea attempts to shew a satisfaction of the debt by the delivery of a bill of exchange, which has been indorsed over to a third person. It does not allege, that the bill was given "for and on account," of the debt, but "in discharge," which implies a satisfaction. [*Parke*, B.—It means "for and on account," and perhaps something more; the replication is clearly bad?] If the plea only means that the bill was given for and on account of the debt, then the plea is bad.

PARKE, B.—No. If the bill was given on account of the debt, and is indorsed over, it is a suspension of the debt. The plea is perfectly good, and the plaintiff may have liberty to amend, otherwise judgment for the defendant.

ALDERSON and GURNEY, Bs., concurred.

Judgment accordingly.

THOMAS V. WILLIAMS AND BOWER.

1 Dowl. & Lown. 624.

To trespass against a land-tax commissioner for seizing the plaintiff's goods for a tax which had been redeemed (but without defendant's knowledge); he pleaded not guilty, by statute, and delivered particulars stating that he intended to rely on the 38 Geo. III., c. 5, and 21 Jac. I., c. 12. At the trial the defendant claimed to be entitled to notice of action under the 5 and 6 Wm. IV., c. 20, s. 19, and the plaintiff being unable to prove the particulars was nonsuited; held, that the nonsuit was right.

Trespass for breaking and entering the plaintiff's dwelling house, and taking his goods.

Plea, not guilty (by statute).

The defendant Williams was a commissioner of the land-tax, and the other defendant a constable, who had levied for the tax. A judge's order had been obtained for the delivery of particulars of the statutes upon which the defendants relied and they referred to the 38 Geo. III. c. 5, and 21 Jac. I. c. 12.

The case for the plaintiff was, that the land tax in respect of which the seizure was made, had been previously redeemed, but it appeared that the defendants were not aware of it. At the trial, it was contended on the part of the defendants, that they were entitled to notice of action, under the 19th section of the 5 & 6 Wm. IV. c. 20, (the Stamp and Tax Office Consolidation Act). It was answered on behalf of the plaintiff, that the defendants were precluded by their particulars from relying on the statute. The plaintiff, however, was unable to prove the particulars delivered, the document produced being merely a copy. The learned judge directed a nonsuit, reserving leave for the plaintiff to move to set it aside.

Chilton now moved accordingly and contended, first, that on the authority of *Cann. v. Clipperton*,^(a) no notice of action was necessary. Secondly, that defendants could not avail themselves of the 5 & 6 Will. IV. c. 20, as their particulars stated that they intended to rest their defence upon the two other statutes.

LORD ABINGER, C. B.—There shall be no rule. Notice of action is required by the 5 & 6 Will. IV. c. 20, and if the plaintiff wished to avail himself of the particulars delivered, he should have been prepared to prove them.

PARKE, B.—The defendants acted bona fide, and are entitled to notice of action, under the 5 and 6 Will. IV. The acts of parties, in the situation of these defendants, should not be scanned so nicely, otherwise they would lose the protection which the Legislature intended to afford them in cases where they had acted in honest ignorance that they were doing wrong.

GURNEY, B., concurred.

ROLFE, B.—This is one of the cases of misconduct which the statute meant to protect. Where a man acts rightly, he does not require the protection of the statute.

Rule refused.

(a) 10 Ad. & Ell. 582; S. C. 2 P. & D. 560.

THE UPPER CANADA JURIST.

LAW MAXIMS.

(Continued from page 213.)

In general, if money is paid by compulsion of the legal process of a court of competent jurisdiction, and without fraud, that is, by compulsion of a judgment of the court, whether on verdict or by confession on a *cognovit actionem*, (a) or if it is paid into court under a rule of court, the sum thus recovered (having in one case passed in *rem judicata*, and in the other been paid in on record) cannot be regained in an action for money had and received to the use of the unsuccessful party, whatever the demerits of the judgment, &c., may be, upon the strength of any facts which would have availed him in a defence to the former proceeding, at least as long as the judgment or rule, &c. stands without disaffirmance. (b) For the money thus recovered is not received to the plaintiff's use, but to that of the successful party by authority of law; and were the rule otherwise, the rights of parties could never be finally settled by proceedings however solemn, and judgments would be rendered nugatory by evidence which, if produced at the proper season, might have received a complete answer. (c)

(a) *Marriot v. Hampton*, et. al. 7 T. R. 269; 1 Esp. 546, S. C., relied on per Cur. in *Reynolds v. Wade*, 4 Bing N. C. 700; and re-stated by Lord Denman in *Wilson v. Ray*, 10 Ad. & E. 88. Note this last case was much questioned in argument in *Gibson v. Bruce* in C. P. 12 L. J. 132. Lord Tenterden's notes in *Turner v. Hoole*, 1 D. & Ryl. Nisi Prius Reports, were handed up to the bench, to show that the creditor had not sued on the bills given him, and that they were out in a third person's hands when paid, as had been supposed by Maule, J. The court, however, refused to overrule *Wilson v. Ray*, but granted a new trial on another ground suggesting that *Wilson v. Ray* would be more properly impugned in a Court of Error. As to the qualification in case of fraud, see 2 B. & P. 402; 2 T. R. 482; 9 Bing. 644.

(b) See *Marriot v. Hampton*, as stated by Lord Denman, in *Duke de Cadaval v. Collins*, 7 Ad. & E. 858; and see by Patteson J. *id.* 866; *Pillips v. Hunter*, 2 H. Bla. 415; *Malcolm v. Fullarton*, 2 T. R. 645; also *Moses v. Macfarlane*, 4 Burr. 1009; *Kendall v. Alken*, 10 Bing. 438.

(c) Per Cur. in *Wilson v. Ray*, 10 Ad. & E. 88.

The facts of *Marriot v. Hampton* deserve to be here stated, as from their common occurrence in every-day life, they afford the most useful illustration of the maxim. In a former case, (a) *Eyre, C. J.*, by way of illustration, put the case of a man's recovering a debt which had been already paid him, on account of the receipt being mislaid, and then said, that though the receipt when found afterwards, disproved the whole ground of the recovery, yet the action of money had and received was never thought to lie for it. Two years after, the case thus supposed by *C. J. Eyre* occurred in fact, in *Marriot v. Hampton*. Hampton sued Marriot for goods sold, though Marriot had previously paid for them and obtained Hampton's receipt. However as it could not be found at the time, and there was no other proof of the payment, he could not defend the action, so was obliged to submit and pay the money again, and gave a *cognovit* for the costs. Marriot afterwards found the receipt, and brought his action against Hampton for money had and received, in order to recover the sum he had thus paid a second time. But the court, for the reasons above stated, held him estopped for suing. It should be remembered that the *bona fides* of Hampton was not negatived by the evidence, for in the absence of contrary proof, he might have believed the debt to be still due; (b) and it would seem that in equity (c) it is too late after a verdict to file a bill for discovery, on the ground of having lost receipts; though in a previous case, the Court of Chancery, on bill filed, ordered a new trial, on the ground that a note, for want of which the verdict was lost, had been found since the trial at law. (d)

The judgment of the Mayor's Court of London against a garnishee on the custom of foreign attachment is another instance of that "process of law" which will prevent payments made by its coercion from being voluntary, so as to render them null as against the creditor of his assignee. (e) Again, a probate obtained as the judicial act of the competent eccle-

(a) *Phillips v. Hunter*, 2 H. Bla. 415.

(b) Per Lord Denman, 4 Ad. & E. 864.

(c) *Barbone v. Brent*, 1 Vernon, 176; Turn. 1683, see *Richards v. Symes*, *infra*.

(d) *Hennell v. Kelland*, 1 Eq. Cas. Abr. 377, pl. 2.

(e) See *Williams v. Everett*, 14 East, 588.

siastical court, will save a party who has paid the executor a debt due to testator from paying it again, though the will afterwards proves forged, and the probate is annulled; for the payment was to a person who at the time had the legal authority of the probate to receive it, and the debtor was not obliged to wait for a suit to which he did not know that any defence could be made.(a) Nor is it any defence to an action for a debt, that since it was incurred the plaintiff has committed an act of bankruptcy, of which defendant is aware; for till followed up by the suing out a fiat, the plaintiff's act of bankruptcy would not so "overreach" a judgment subsequently recovered without collusion, as to make a payment under it merely voluntary, or other than one enforced by coercion of law, and therefore valid against any claim by the plaintiff's assignees under any subsequent commission.(b) Again, the interlocutory order of an inferior court in a borough, for paying out to a plaintiff money deposited there by a defendant in lieu of bail, on the ground that no bail had been afterwards perfected, or the requisites of 7 & 8 Geo. IV. c. 71, s. 2, complied with, was held sufficient process of law to protect the payment made under it from being ripped up by the defendant's assignees as merely voluntary, though he had committed an act of bankruptcy before the money was paid in, and that fact was communicated to the court before it was ordered to be paid out.(c) For as no fiat was issued at the time the order was made, the court had no power to refuse it.(d)

Again, where mesne process had issued against the plaintiffs, after demand of a particular sum by letter, in terms sufficiently explicit to call their attention to the subject, and they paid the amount in consequence of the writ, they were held not entitled to recover the sum so paid as money had and received to their use, on the grounds of its being paid by mistake, and without knowledge or reasonable means of knowledge of the facts on which the demand

(a) *Allen v. Dundas*, 3 T. R. 125.

(b) *Foster v. Allarson*, 2 T. R. 479; see now 6 Geo. IV. c. 16, s. 86; *Whitmore v. Robertson*, 8 M. & W. 463.

(c) *Reynolds and another, assignees, v. Wedd*, 4 New C. 694; see 6 Geo. IV. c. 16, s. 82; *Ferrall v. Alexander*, 1 D. P. C. 132.

(d) *Hannah v. Willis*, 4 New C. 310.

had proceeded; and the court granted a new trial after verdict for the plaintiffs, assenting to the judgment of Holroyd, J., in *Milnes v. Duncan*, 6 B & C. 679, that as the money had been paid after legal process actually issued to recover it, the then defendants knowing the cause of action proceeded on, no action was maintainable to recover it back.(a)

But where a certificated bankrupt was taken in execution for a debt provable under his commission, and in vain claimed his discharge till he deposited the debt and costs, protesting against the right to demand either, and warning the sheriff not to pay over any of the money, he intending to dispute the plaintiff's claim to it, the court made a rule absolute against the sheriff and the plaintiffs for paying it over to the defendant, saying it was not the case of a party who, with knowledge of the facts, paid over money under legal process, as in *Hamlet v. Richardson*, but a payment under protest, by which he said, in effect, that if the sheriff was not entitled to take it, it must be paid back.(b)

The order of a judge has been held such legal process as would protect persons receiving payment from the person ordered to pay, against a suit by his assignees(c) to recover it, though his attornies had, in fact, paid over the money, after his bankruptcy, out of funds furnished them by him for the purpose, before the fiat issued. *They* might, however, be liable to an action by the assignees, the property in the money having vested in them at the time it was parted with. Payment of money by a sheriff, under compulsion of attachment, is placed on a similar footing.(d)

The principle of these decisions is, that the party aggrieved should resist the claim in the first instance, so that there should be some end of litigation and cross actions,—a result which would never arrive, if after a recovery by legal process,

(a) *Hamlet v. Richardson*, 9 Bing. 644. Though the marginal note introduces an exception in case of fraud on the part of the person obtaining the money, no fraud seems to have been in question in the case. If *Cobden v. Kenrick*, 4 T. R. 432, n. can be supported on this point at all, it must be on the ground of fraud in defendant, when plaintiff in the former action. S.C.

(b) *Payne v. Chapman*, 4 Ad. & E. 364.

(c) *Belcher, assignee, v. Mills and another*, 5 Tyr. 715, acted on in 4 Bing. N. C. 694, *Reynolds v. Wedd*.

(d) *Belcher v. Mills*.

a door was opened for parties to try their causes again, because they were not properly prepared the first time with the necessary evidence, or possessing it, accidentally omitted to produce it at the trial; and though in one case, which we shall now shortly state, the rule was relaxed, the later decisions show that its principles can by no means be extended. A party was sued for a debt in a court of conscience, as indorser of a bill, and from the inferior nature of the jurisdiction, and the mistake of its judges, was prevented from availing himself of a defence which was open to him at law, viz: that the indorsee, the plaintiff, agreed that the indorser should not be liable by reason of his indorsement. However, the indorsee having obtained judgment for the amount of the bill against the indorser in the inferior court, the Court of King's Bench suffered the latter to recover it back in an action for money had and received.^(a) But *Moses v. Macfarlane* is now doubted; Eyre, C. J., said of it,^(b) that he could never subscribe to it "it seemed to unsettle foundations," and suggested that the proper remedy would be by action for breach of the agreement to keep the indorser harmless. It would seem that the damages in such an action would be measured by the amount recovered on the bill.

But a surety who is primarily liable, e. g. as maker of a joint and several promissory note, may safely pay the amount for which he is liable on it, without waiting till the money is sued for, or even demanded. For he will not thereby endanger his remedy against his co-surety for contribution; as such payment, though not by compulsion of legal process, is not voluntary, or, in other words, not in his own wrong.^(c)

Again, if money is paid in consequence of the fraudulent abuse, or even the colourable use of *ex parte* legal process, by one who knows he has no right to the money he obtains, it may be recovered back.^(d) In August, 1834, the Duke de

(a) *Moses v. Macfarlane*, 2 Bur. 1006, as stated by Lord Kenyon at Nisi Prius in *Marriot v. Hampton*, 1 Esp. N. P. C. 548.

(b) *Phillips v. Hunter*, 2 H. Bla. 416.

(c) *Pitt v. Purssord*, 8 M. & W. 538; sec. 6 *id.* 153.

(d) *Duko de Cadaval v. Collins*, 4 A. & E. 858, commented on per Cur. 10 Ad. & E. 89.

Cadaval, who had been a member of Don Miguel's administration in Portugal, fled from Lisbon to England, and while resident at Falmouth was arrested on mesne process for a debt of 10,000*l.*, sworn to be due from him to one Collins, who assumed to have claims on the late Portuguese Government. The Duke, in order to obtain his release, and to get time to put in bail for the residue of the sum claimed, paid Collins 500*l.* "in part of the writ," and was accordingly set free; but the writ being afterwards set aside for irregularity, no bail was put in, and he sued Collins to recover the 500*l.* as money received to his use. It was shown that in 1833 Collins had filed his schedule, in order to procure his discharge under the insolvent act, without inserting this alleged claim on the Duke. The jury were of opinion that Collins knew at the time of the arrest that he had no such claim, and found a verdict for the plaintiff for the whole amount. On a rule for setting aside the verdict, it was argued for Collins, that if he had in fact no claim on the Duke, still as the money was paid in part of the debt claimed, it could not be recovered, and if it was paid as a consideration for the delay required to procure bail, the Duke, by not putting in bail, had forfeited his right to recover. It was further urged, that the payment, if under pressure of legal process, was merely voluntary; for though the claim was one which could not be supported, the pressure used was not that sort of compulsion which avoids a contract, for the law which furnished the pressure also supplied the defence.

The court assented to the general proposition that money paid with full knowledge of the facts, or under legal process *bonâ fide* issued, though for a claim which turns out unfounded, cannot be recovered, inasmuch as there must be some end to litigation; but held that as, in the case before them, the jury found the arrest to have been made by the defendant, he well knowing that he had no claim to the money, it was paid under compulsion of colourable legal process, and the Duke was entitled to regain possession of his money, never having parted with the property in it.

The case of *Wilson v. Ray*, 10 Adol. & E. 82 (ante, 200), was as follows. The plaintiff sought to compound with the defendant and his other creditors for eight shillings in the

pound, but the defendant refused to sign the composition deed unless he were paid in full. Plaintiff, in order to obtain his signature, accepted a bill drawn by defendant's clerk for the difference of twelve shillings in the pound. The marginal note states that the clerk was the payee. Defendant then signed the deed. Plaintiff dishonoured the bill, but afterwards, on application, and without suit, paid the amount to the defendant's clerk, who placed it to the plaintiff's credit with the defendant, as defendant had gone on furnishing goods to the plaintiff. The defendant received the eight shillings in the pound also, and the other creditors that sum only. The Court held that as the transaction had been closed by a voluntary payment with full knowledge of the facts, the amount paid to the defendant above eight shillings in the pound, though without suit, could not be recovered. This case has been much questioned in the Court of Common Pleas in *Gibson v. Bruce*, by Sir T. Wilde *arguendo*, and will probably be canvassed in a court of error if that case is re-tried.

There is a case in the Exchequer of *Horton v. Riley*,^(a) in which *Wilson v. Ray* is mentioned, but the court express no opinion upon it. In *Horton v. Riley*, the defendant, being a creditor of the plaintiff, entered into a composition deed with the other creditors, to receive ten shillings in the pound, under an agreement with the plaintiff that he would give the defendant his promissory note for the remainder of the debt, which the defendant should keep in his own hands; and the note was accordingly given, and the composition paid to the defendant, who negotiated the note, and the holder compelled payment by the plaintiff, and it was held that the plaintiff might recover back from the defendant the sum so paid by him in an action for money paid.

The spirit of the laws derived from our hardy forefathers favours those exercises of the athletic kind which involve trials of manhood, strength, and skill, if prosecuted by way of friendly contest, and without public exhibition likely to lead to riotous assemblies. Nor does the quantum of danger necessarily incident to them, form any objection to their legality,

(a) 11 M. & W. 492.

unless prosecuted with weapons which, in their ordinary nature even when not abused from malice or revenge, are deadly. Thus wrestling, sparring with gloves, fencing with foils, or even cudgel play, by acquaintances, and with mutual consent, being exercises in which the hazard is rarely attended by fatal consequences, nor, in Mr. Justice Foster's words, is bodily harm the motive on either side, are recreations to which the maxim "*Volenti non fit injuria*" applies; and should death unhappily ensue, the homicide is reduced to misadventure. Whereas, if from want of fair and usual caution in the exercise, as by striking with a cudgel before the opposite party is on his guard, or using a sword in a scabbard instead of a foil in fencing, and that so roughly as to beat off the chape and run him through, death ensues, this will of course take away the operation of the maxim, and constitute the crime of manslaughter : (a) a fortiori, if from surrounding circumstances the pretence of diversion appears a mere cloak for gratifying a vindictive feeling.

Blackstone, indeed, treats cudgel playing as illegal; (b) and fighting with fists by mutual consent, though only for ascertaining the mastery, and without contending for money, is held out of the purview of this maxim, as being a breach of the peace, so that either party may sue the other, for it is a breach of the peace. (c)

The ancient joust or tournamen was only legal when held by the king's command, which was supposed to be given for the advancement of his subjects in warlike exercises.

The law requires reasonable presence of mind and exertion in the moment of danger. Thus a person, who, being placed in hazard by the wrongful or negligent act of another, sustains in the result an injury, which, by reasonable exertion and ordinary care he might have avoided, cannot recover damages, for he is then author of his own wrong; but if he could not

(a) See East's Pleas of the Crown, 268, 269. See also Comberbach, 408; Com. D. Pleader, (3 M. 18); Dalton, cap. 148; Bull. N. P. 15.

(b) 4 Bla. C. 183. That a cudgel might be used to correct a servant, see Comberbach, 408.

(c) Boulter v. Clerk, by Parker, C. B. at Abingdon, 1747; Matthew v. Ollerton, Comb. 218; and other cases collected, Bull. N. P. 16; and Smith v. Bickmore, 4 Taunt. 474.

have so escaped it, his mere negligence in exposing himself or property to a peril, so occasioned, will not shut out his remedy by action.(a)

Thus it cannot be said that because a man is lying asleep on a road, or goods are left there, or a carriage or horse is on the wrong side of it, or an ass is fettered there, a party who purposely drives against either is excused.(b) But if the proximate and immediate cause of damage be the want of competent skill in the party hurt, e. g. if in a dangerous position of his carriage as regards another, he pulls the wrong reign, and thus approaches nearer to the danger, when pulling the right one might have cleared him from it, he cannot recover, though the primary cause of the risk he ran be the misfeasance, viz., the violent or improper driving of another person.(c)

A signal instance of the operation of this maxim is afforded in the case of a party who having entered a wood of sixty acres in extent to gather nuts, with express knowledge that spring-guns were set there, accidentally trod on the wire of one and was injured by its discharge, the court held him not entitled to recover against the owner of the wood,(d) by whose order the spring-guns had been set there.

Condonation, or forgiveness of adultery by the aggrieved wife or husband, will bar a suit in previous acts of that nature. It is evidenced by the continuance of cohabitation after probable knowledge of the fact committed, and differs essentially in its nature from connivance; for while the one may be long-suffering forgiveness of injury, especially in a wife, the other necessarily involves a criminality which prevents the party conniving from obtaining a divorce; and no man can have relief from a court of justice for an injury which he was himself chiefly instrumental in effecting, *volenti non fit injuria*. There may be condonation of cruelty

(a) See the judgment of Parke B. in *Bridge v. Grand Junction Railway Company*, 3 M. & W. 247, citing *Butterfield v. Forrester*, 11 East, 60; also *Lynch v. Nurdin*, 1 Q. B. R. (or New Series of Adolphus and Ellis) 29; *Davies v. Mann*, Exch. M. 1842; 10 M. & W. 546, collecting the cases.

(b) *Flower v. Adam*, 2 Taunt. 314. See *Marriot v. Stanley*, 1 M. & Gr. 568; and cases collected, *id.* 576, note. *Davies v. Mann*, 10 M. & W. 546.

(c) 11 East 60; 3 M. & W. 248.

(d) *Ilott v. Wilkes*, 3 B. & Ald. 307. See *Lynch v. Nardin*, 1 Q. B. R. 29.

committed in the marriage state ; but a wife's repeated forgiveness of acts of the kind is far less cogent evidence of such condonation as would oust her right to a divorce, than a husband's passing over even single acts of adultery by his partner by acquiescence or connivance.(a)

The legislature has followed up the maxim of "*Interest reipublicæ quod sit finis litium*," by the statutes of limitation for barring actions on obsolete claims, whether just or not, after the lapse of various periods from the accruing of the causes of action, and by the statutes of set-off, which afford defendants facilities of establishing their counter-demands on plaintiffs without being driven to bring cross-actions against them. The courts, too, oppose a multiplicity of actions, by so judging of contracts as to prevent a circuitry of them in cases where, on the parties changing their relative positions of plaintiff and defendant, the recovery by both would be equal.(b)

So far is this doctrine acted on, that a court of equity, which had directed an issue to be had at law, would not after verdict for the plaintiff in equity, grant a new trial, merely because the defendant in equity was not apprised of certain evidence given against him at the trial at law, and was not *then* prepared to answer it : for he might have submitted to a nonsuit, and the court of equity might have directed another issue afterwards.(c)

During the comparative insignificance of personal property, the common law attached more importance to actions for matters of freehold and inheritance, than for debts, chattels, and effects : thus, in the former, called actions real, writs of a higher degree were permitted, by which to re-try a matter before adjudged on, on a writ of a less paramount nature, which could not operate as a bar ; whereas, in personal actions, the rule was, "once barred always barred," *i.e.* a recovery in one action was to bar another, except for error in fact or

(a) The authorities on this subject are collected and ably stated in *Shelford on Marriage and Divorce*, 445, et seq.

(b) See cases collected, 2 *Saund.* 46 t. 150 ; also *Penny v. Innes* 5 *Tyr.* 107 ; *Carr v. Stevens*, 9 *B. & C.* 758 ; and 10 *Ad. & Ell.* 85, 86.

(c) *Richards v. Symes*, 2 *Atk.* 319.

law.(a) And in *Outram v. Morewood*,(a) the court declared that principle to apply, not only to personal but to all actions (including real and mixed actions) then existing, quoad their own subject matters, by way of bar to future litigation for the things thereby decided.(a) Accordingly, they held that if a verdict is found on any fact, or it be distinctly put in issue by the record in trespass, such verdict may be *pleaded*(b) by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title.

In *Lord Bagot v. Williams*,(c) 7000*l.* being due from defendant to plaintiff, for monies received to his use, the plaintiff's agent directed an action to be brought for 4000*l.* in an inferior court. On judgment passing for default, he verified by affidavit for 3400*l.* only, because the defendant, as he then thought, had no property exceeding that sum in value. This act of abandonment by the agent was held to prevent the plaintiff from afterwards recovering any sum which, before he sued in the inferior court, he knew the defendant to have received. Thus the plaintiff was not allowed to say that the former recovery was not in respect of his whole demand, though, had there been a cause of action of a wholly different kind, e.g. on a promissory note, as to which no evidence was given in fact, he might have maintained the second action.

And where in an action of debt, the defendant pleaded that he had before impleaded the plaintiff in an action on promises, and that the plaintiff had then pleaded a set-off, which was for the same subject matter as the present action, and that upon that plea a verdict had been found against him, and judgment thereon, by which he was estopped from bringing an action to recover the subject of the set-off claimed in the former suit, and the plaintiff replied that he had offered no evidence of the set-off at the

(a) See instances of writ of *aiel* barring one of *besaiel*, being both ancestral, but not barring a writ of right, &c., &c., *Ferrers' case*, 6 Rep. 9; Cro. El., 668, S.C.; Com. Dig. tit. "Action" (L.); Coke's preface to 8th Rep. Remarked on by Lord Ellenborough, in *Outram v. Morewood*, 3 East, 358. Also, *Robinson's case*, 5 Rep. 32; *Kitchen v. Campbell*, 3 Wils. 308. Real actions abolished, with exception of *formedon*, and in some cases *dower*, &c.; 4 Will IV., c. 1.

(b) It *must* be pleaded. *Vooght v. Winch*, 3 B. and Ald., 662. See per Parke, B., *Doe d. Strode v. Seaton, T. and Gr.*, 19; 2 C. M. & R., 732.

(c) 3 B. & Cr., 235; see 9 B. & Cr., 786; 7 Bing., 716.

former trial, but that the same was still due to him, it was held that the plea was a good bar, and that the matter having been pleaded, and judgment passed on it, in the former action, could not again be litigated.(a)

For were defendants at liberty to review every cause already tried and adjudged on, every case must be twice tried ; but “*interest reipublicæ ut sit finis litium.*”(b)

The courts will protect by their authority the possession of land recovered by their judgment, if it is ousted afterwards by the disseisin or trespass of the defendant in the action, because it is done against the judgment of the court, and in despite of the law : and they may commit him, for “*interest reipublicæ ut judicia rata sint, et ea quæ in curiâ nostrâ rite acta sunt, debitæ executioni demandari debent.*”(c)

The same principle is also expressed by the maxim, “*Nemo debet bis vexari pro eâdem causâ. si constet curiæ quod sit pro unâ et eâdem causâ* ; the rule of law being that the same cause of action shall not be brought twice to a final determination. If the same evidence will support both actions, though they may happen to be grounded on different writs, that is what is meant by “the same cause of action,” and is the test which runs through all the cases in the books, to know whether a final determination in a former action is a bar to a subsequent one or not ; and this was so, as well in real as in mixed or personal actions.(d)

Thus a judgment for the lessor of the plaintiff in ejectment being only “that he do recover the term aforesaid,” viz., that mentioned in the declaration, is no bar to another ejectment on a new demise ;(e) for the same evidence does not necessarily support both actions, and the rule of law is, that judgments only bind parties or privies, and cannot be given in evidence but when the benefit may be mutual, viz., such as the defendant might have made use of by giving it in evidence in support of his case, as well as the plaintiff in support of

(a) *Eastmure v. Laws*, 5 Bing. N. & 444.

(b) Per Lord Kenyon in *Marriot v. Hampton*, Esp. N. P. C. 548.

(c) Co. Inst., 83, stat. Merton.

(d) *Kitchen v. Campbell*, 3 Wils., 308 ; 2 Bla. R., 831, S. C.

(e) *March's Rep.* pl. 92, cited Com. Dig. tit. Action, (L. 4.)

his,(a) and therefore cannot be produced as against strangers, being *res inter alios acta*.(b)

Some text books were supposed to show that a judgment in ejectment cannot be admitted as evidence of the lessor's title,(c) but that authority only applies where the the substantial parties are different, so that the judgment is *res inter alios acta* ; and it seems now settled that where they are the same, the judgment recovered by a defendant in a former ejectment, viz., that John Doe be amerced for his false claim against him, and that he go thereof without day, may be given in evidence against the same lessor of the plaintiff at the trial of a second ejectment, if the particulars of the lands demised in the first are also produced, though the parties are not, technically considered, the same, and the demise is for a new term;(d) for as the consent rule binds the defendant to plead not guilty only, he cannot plead the judgment by way of estoppel, which is the only way to make it conclusive.(e) After all, the allowing a second ejectment to be brought may have also originated more in its being a mixed action, partaking of the nature of the real actions it succeeded, than in the technical distinction afforded by its peculiar pleadings ; for the authorities above alluded to, quite establish that, during the prevalence of real actions, several trials of what was substantially the same title could take place, if not in the same form of real action,(f) at all events, in a different degree of a like action.

But in an action of trespass for mesne profits, after a recovery in ejectment, if the defendant plead *liberum tenementum*, or that the plaintiff was not possessed, the plaintiff may reply the judgment in ejectment by way of estoppel, and thereby prevent the defendant in that form of action again litigating the question of title, so long as the demise in the original declaration of ejectment continues.(g)

(a) Bull. N. P. 233.

(b) Doe v. Harvey, 8 Bing. 242.

(c) Adams on ejectment, 2d ed. 188, citing Clerke v. Rowel, 1 Mod. 106.

(d) Doe d. Strode v. Seaton, T. & Gr. 19; 2 C.M.&R. 731; B. N. P. 232; 4 Bac. Ab. tit. Evidence, F; Wright v. Doe d. Tatham, 1 Ad. & E. 19.

(e) S. C. Vooght v. Winch, 2 Barn. & Ald. 662.

(f) See per Eyre, C. B.; Barefoot v. Fry, Bunbury, 159

(g) Doe. v. Wright, 10 Ad. & El. 763.

Another exception to the rule against suing twice for the same cause of action is, where the first judgment has been obtained by the defendant in consequence of an error in pleading by the plaintiff. Thus, if a man, who ought to sue as executor, declares as administrator, and has judgment against him accordingly on demurrer, he may set his error right in a second action.(a)

And if a judgment has been give on demurrer upon a mere matter of form against a plaintiff, it will be no bar to a future action.(b)

By the present practice several successive ejectments may be brought by the losing party to try the same title, on paying his antagonist the costs of the previous action in which he has succeeded : (c) but after three trials had, it appears that a court of equity will interfere to quiet the possession in favour of the party last succeeding, and thus enforce the maxim *Interest reipublicæ quod sit finis litium*.(d)

This principle is extended to prevent a defendant from being arrested on mesne process twice for the same cause of action, (e) but not unless it "appears clearly to the court," that the second cause of action is identical with that on which former process has been had. (f) So after a nonsuit on ground of variance between the declaration and the evidence in a former action in which the defendant was arrested, he may be again arrested in a second action for the same cause, for under the circumstances there was no vexation. (g)

If all joint contractors are not sued, those who are sued may plead in abatement, though one has become bankrupt and obtained his certificate ; for as he was not discharged

(a) Robinson's case, 5 Rep. 32 b.; Lepping v. Kedgwin, 1 Mod. 207, cited 3 Wils. 308.

(b) 2 Saund. 47, b.; 3 Wils. 309. 1 Mod. 207. Black. Rep. 931. 1 Mod. 207.

(c) 4 Modern, 349, cited per Cur. Stra. 1152.

(d) Dalton v. Dalton, temp. Lord King, Select Chanc. Cas. 13: Bath (Lord) v. Sherwin, Dom. Proc., 1 Bro. P. C. 266, &c.; Leighton v. Leighton, Stra. 404; Vin. Abr. tit. Injunction, (D.)

(e) Tidd. 9th ed. 174; 1 Chit. R. 273, n.

(f) Musgrave, &c., Assignees, v. Medex, 8 Taunt. 24. There a writ of ne exeat regno had issued for 350*l.* balance of a much larger sum claimed, and which smaller sum defendant admitted to be due; a subsequent arrest at law was for a much larger sum. The writs were granted *diverso intuitu*.

(g) Kearney v. King, 1 Chit. R. 273, and cases *notis*; S. C. 3 B. & Ald. 301.

absolutely, but only in such way as the legislature has prescribed, he was not bound to take the benefit of it, and "*quivis renunciare potest juri pro se introducto.*"(a)

Tenants in tail had not power to make leases for three lives or twenty-one years, before 32 Hen. VIII. c. 28, gave it them collaterally, and it was held that a gift in tail, on condition that donee shall not make such a lease, is good; for the power, not being incident to the estate, may be restrained by condition and his own agreement.(b)

That "*Modus et conventio vincunt legem,*" is a maxim as old as our law; accordingly contracting parties may introduce stipulations for excluding the operation of any general rule of law from their agreement. Thus a factor's lien for his general balance on all goods of his principal coming into his hands was held to be shut out by his having accepted a deposit of them for sale, and promising to pay the proceeds when sold to the principal or his order.(c)

But restrictions are imposed on this maxim in order to avoid perpetuities. For, where a grantor conveys an estate in fee, he cannot annex to his grant a condition not to alien; nor, when he conveys an estate tail, a condition not to bar the entail; but short of these restrictions, both parties to a contract may model it after what manner they please. Thus, though the grant of an estate *primâ facie* carries with it all legal incidents, that grant may be modified according to the wish of the parties, and the grantee's rights must be considered with reference to the restraints which have been imposed on him. Again, as covenants may be introduced into a lease, that it shall be void in case of the issuing of a commission of bankrupt or execution against the tenant, if a lessee, who only covenants not to assign, transfer, &c., or part with the indenture, with a proviso empowering the landlord to re-enter in such case, gives a warrant of attorney to confess judgment, on which the lease is taken in execution and sold, or becomes bankrupt, and his assignees assign it, it is not forfeited to the

(a) *Bovill v. Wood*, 2 M. & S. 25.

(b) *Co. Lit.* 223 b.

(c) *Walker v. Birch*, 6 T. R. 258.

lessor,(a) except the warrant of attorney was given with the express purpose of enabling the creditor to get possession of the lease under the judgment.(b)

But a bond conditioned for any thing against the law, viz., not to use a trade, &c., in a particular place, will not bind the obligor, though it be sanctioned by a charter of the crown assuming to prevent trading in such cases except on stated terms; for the general restraint of free trade is illegal;(c) but a contract by which a party for adequate valuable consideration binds himself to another not to carry on a particular business within a certain limited district, is valid at law and equity.(d)

This maxim prevails even where one contracting party, by misrepresentation of the other, was induced to believe his own title much inferior to what it really was, and make an agreement accordingly under a mistaken view, and without valuable consideration.(e)

A mere general letting is a letting at will; but if the lessor accepts yearly rent, the rent measured by any aliquot part of a year, that acceptance is held evidence of a taking for a year, the tribunals inclining to make every tenancy a holding from year to year if they can find any ground for so doing. But where parties agreed to let premises for as long as they both should please, reserving as compensation to the lessor the dung of the lessee's horses; the court, finding nothing referable to rent for any part of a year, gave effect to the parties' agreement as a tenancy at will, and were unable to presume a larger tenancy.(f)

If the act of a party (e. g. the granting a lease) may be referred to his interest in the thing demised and also to an independant power or authority, both which meet in him there, though, had he been silent, the law would refer his act to his

(a) *Doe d. Mitchinson v. Carter*, 8 T. R. 57; recognized 3 M. & S. 353; 12 Ves. J. 513; 13 id. 395.

(b) S. C. 8 T. R. 300.

(c) *The Clothworkers of Ipswich case*, Godbolt, 252, resting on Year Book 2 H. V. 5.

(d) See *Mallam v. May*, argued in Exchequer May 1, 1843; 6 Ad. & E. 438; 1 Sim. & Stu. 77, n.; 14 Ves. 468; 17 Ves. 335; 18 Ves. 438; 4 East. 190; 2 Russ. 357; 2 Swanston, 253; 2 M. & Gr. 20.

(e) *Frank v. Frank*, 1 Ch. Cas. 84; cited 2 Merivale, 303.

(f) *Richardson v. Langridge*, 4 Taunt. 128.

interest, yet if he has declared clearly, e. g. by recital, his election or will to be that his act shall take effect by his authority or power, it will do so accordingly. Thus where a lease expressly referred to the lessor's power to make it, it was held to operate by way of appointment under the power, and not to any grant out of an estate and interest possessed by her enabling her to demise independent of it.(a)

A mere personal contract to pay, being a mere chose in action, is not in general assignable by law, but a rent granted pro consilio impendendo to one *and his assigns*, may be assigned over under the express words of the grantor himself, the *conventio* which *vincit legem*.(b)

Partition may be made by consent and agreement among parceners differently from that which must be made under the writ de partitione faciendâ; as where the youngest of three wishes partition, and the other two do not, one part may be allotted her in severalty, and the others may hold the remenant in coparcenary without partition, or make partition after, instead of each taking her part in severalty at first, as would be under the writ, for "consensus tollit errorem," and *modus et conventio vincunt legem*.(c)

The construction and exposition of deeds should be the useful and usual one, subject to the maxim *quod modus et conventio vincunt legem*.(d)

"*Consensus tollit errorem*." Thus, where a cause involving a right of way concerned all the inhabitants of Canterbury, being a county of a city, and the visne or jury awarded from W. in Kent by assent of the parties, found for the plaintiff, it was held no mis-trial.(e) For this reason, as it seems, dower made by assent of the husband's father was good, though the wife was within the age of nine years.(f) The fines formerly paid for amendment of bad pleading in beauleader, and assessed since the first arrival of Henry the Third in Britain, were not taken away by stat. Marlbridge, chap. 11, for they "first grew by consent of parties."(g)

(d) Trenchard v. Hoskins, Litt. Rep. 203.

(a) Roe d. Earl of Berkeley v. Archbishop of York, 6 East. 86; relying on passages in Colt v. Bishop of Lichfield, Hobart, 160.

(b) Maund's case, 7 Coke, 28 b; see Frazer's note, 4 vol. new edit. 110.

(c) Co. Lit. 180.

(e) Fineux v. Hovenden, Cro El. 664.

(f) Litt. s. 42; Co. Lit. 37 a.

(g) 2 Inst. 123.

“ [*In æquali jure*], *qui prior est tempore, potior jure esse videtur.*”

This maxim is borrowed from the civil law, and turns the balance of equal equities: thus, where one of two innocent persons must suffer, he who has not used due diligence must be the loser.(a)

For the like reason this rule prevails among mortgagees, who are considered purchasers *pro tanto*; for where of three mortgages the first is bought in by the owner of the third, though pending a suit by the second to redeem it, such puisne or third mortgagee, by thus acquiring the legal title as a *tabula in naufragio*, has got the law on his side with equal equity, and will therefore be permitted to tack the first and third together, to the exclusion of the second.(b)

In descents the rule is, that the next of the worthiest blood shall ever inherit, so that among males the eldest brother and his posterity take lands in fee simple as heirs before any younger brother or descendant of his; for the elder born “*est puis digne de sanke*,” by virtue of the maxim *qui prior est tempore potior est jure*.(c) Courts of equity in cases of conflicting rights to real property, ask, not who was first in possession, but under what instrument, or how is the right dated in point of time? or if there be no instrument, when did your right arise,—who has the prior right?(d) It forms the general rule between incumbrancers and purchasers; so that he whose assignment of an equitable interest in a fund is first in order of time, has, by virtue of that circumstance alone, the better right to call for the possession of the fund.

(a) *Keach v. Hall*, Doug. 23; and see judgment of Plumer, M. R. in *Dearle v. Hall*, 3 Russ. R. 20.

(b) *Robinson v. Davison*, 1 Bro. Ch. C. 61, and *Rrace v. Marlborough*, 2 P. W. 491. See 1 Mylne & Keen; 297; 2 Simons, 257.

(c) Co. Lit. 14 a.

(d) See Sir E. Sugden's argument in *Cholmondeley v. Clinton*, 2 Meriv. 239

(*To be continued.*)

POINTS IN PLEADING AND PRACTICE.

No. 1.—JUDGMENT AS IN CASE OF A NONSUIT.

A great deal of doubt has been thrown upon the proper course to be pursued in applying for judgment as in case of a nonsuit, in consequence of the recent conflicting decisions in the Practice Court; Mr. Justice Jones, in *Elvige v. Boynton*,^(a) and Mr. Justice Hagerman, in *Gibson v. Washington*,^(b) having held, that where a motion was made for judgment as in case of a nonsuit for not proceeding to trial according to the course and practice of the court, after notice of trial had been once given and countermanded, although the notice was *prima facie* evidence that issue had been joined, yet that it might be rebutted by shewing that the *similiter* had not been in fact added, and therefore that the defendant was not in a condition to move; and Mr. Justice McLean, in *Clute v. Badgely*,^(c) having held, that in such a case the notice of trial was conclusive evidence of the joinder of issue, and that the plaintiff could not shew that the *similiter* had never been added. By statute 14 Geo. II. c. 17, sec. 1, where *issue is joined*, and the plaintiff shall neglect to bring such issue to trial, according to the course and practice of the court, then it shall be lawful for the judges of the court, upon motion made in open court (due notice having been given thereof) to give the same judgment for the defendant as in cases of nonsuit; unless, upon just cause and reasonable terms, they shall allow a further time for the trial of such issue; and if the plaintiff neglect to try the issue within the time so allowed, the court shall give such judgment as aforesaid. The statute sets out with stating, that the joinder of issue must first take place, before any motion for judgment as in case of a nonsuit can be made, and the majority of the cases which have been decided on the subject clearly shew, that the English courts have always required that the issue should be complete, before the

(a) 1 U. C. Jurist, 279. (b) Easter Term, 1843. (c) Hilary Term, 1843.

defendant can avail himself of the statute, to take any advantage of the plaintiff's neglect. It will be observed, that the conflicting decisions in the Practice Court have arisen upon motions for not proceeding to trial *according to the course and practice of the court*, and not, for not proceeding to trial pursuant to notice ; but whatever principle governs motions for judgments as in case of a nonsuit upon that ground, must also govern such motions for not proceeding to trial pursuant to notice, where there has been no countermand of notice, for in both cases we must refer to the "course and practice of the court" for our guidance, and there is nothing in the statute to shew that the joinder of issue in the one is not as necessary as in the other. In *Smith v. Rigby*,^(a) it was held, that judgment as in case of a nonsuit could not be obtained, because the similiter was not added, although the last pleading concluded to the country, and the similiter might have been added by the plaintiff at any time ; and in *Ray v. Good*,^(b) where the similiter was entitled in the wrong court, it was considered that there was no similiter, and the motion for judgment was refused ; and if there be several defendants, the issue must be joined as to all of them, before the motion can be made by any one defendant, although as to that defendant the issue may have been joined sufficiently long to entitle him to judgment, if he were sued alone.^(c) And if there are several issues in the cause, some in law and some in fact, although the issues in fact may have been joined in time to have allowed the plaintiff to proceed to trial before the disposal of the demurrers, yet as it is at his option^(d) to try which he will first, he cannot be compelled to proceed on the latter until the former are determined. *Heath v. Boxall*^(e) is also in point, to shew that the issue is not considered to be joined until the similiter is added ; and in *Powell v. James*,^(f) the affidavit on a motion for costs of the day, establishes the same point. The judgment of Mr. Justice McLean, in *Clute v. Badgely*, was founded on the

(a) 3 Dowl. 705.

(b) 5 Dowl. 295.

(c) *Crowther v. Duke*, 7 Dowl. 409 ; *Jackson v. Utting*, 10 M. & W. 640.

(d) *Duberley v. Page*, 2 T. R. 394 ; *Ferguson v. Mahon*, 2 Jurist, 820.

(e) 7 Dowl. 29.

(f) 1 D. & L. 415, S. C. 12, M. & W. 100.

decision of the Court of Common Pleas, in *Corbyn v. Heyworth*,^(a) in which it was sworn that notice of trial had been given, but it did not appear that issue had been joined, and Tindal, C. J., said, "It is sworn that notice of trial was given ; and how could that be, if the cause was not at issue ? I think the affidavit alleges enough, and the rule must be absolute, unless the plaintiff will give the usual peremptory undertaking." But why should the notice of trial be sufficient to establish that the cause is at issue ? In England it frequently happens, that notice of trial is given on pleadings concluding to the country, while there are other pleadings upon which no issue has been joined, and upon such a state of the record no judgment as in case of a nonsuit could be obtained. The statute says that where issue is joined, and the plaintiff makes default in proceeding to trial, that then the defendant may move for this judgment, but the joinder of issue is made a condition precedent, and we submit that in all cases it should so appear in the affidavit on which the motion is founded. That the giving of notice of trial cannot be conclusive evidence of issue being joined, we would contend on the authority of the cases already cited, which establish that even where the affidavit on which the motion is made states that issue has been joined, that statement may be rebutted by shewing that the similiter has never in fact been added, and yet in this case the condition in the statute is complied with according to the defendant's affidavit, and the case cannot certainly be more strong where the very words of the statute are used in support of the motion, then where the fact of the issue being joined is not expressly stated, but is merely to be inferred because notice of trial has been given. We submit, therefore, that in all cases where the defendant moves for judgment as in case of a nonsuit, it should appear by his affidavits that issue has been joined in the cause, and that the fact of notice of trial having been given is not to be taken as conclusive or even *prima facie* evidence of that joinder of issue which the statute requires, before the defendant can take any advantage of the plaintiff's neglect.

(a) 6 Dowl. 181 ; 5 Scott, 335.

JARMAN v. HOOPER and Others.

If father and son have the same name of baptism and surname, and a writ of fi. fa. issue against the son, without the addition of "the younger," prima facie the father is intended. But this is only a prima facie intendment, and if the sheriff take the father's goods under the writ, and to an action of trespass by the father, plead that fi. fa. was issued against him, the prima facie intendment may be rebutted, by proof that the writ issued against the son. *Quære*, whether the sheriff could justify under any form of pleading? *Seemle*, that the writ de indentate nominis, does not apply to a simple taking by a plaintiff of the wrong person or goods; and even if it did, it would not take away the right to bring trespass also. A direction by the attorney to the sheriff, to seize under a writ of execution, is an act done by an agent within the scope of his authority, and binds the principal. The client, therefore, is liable in trespass for the act of the attorney, in directing the sheriff to take the goods of the wrong party.

1 Dowl. & Lown. 769.

Trespass for breaking and entering the dwelling-house of the plaintiff, in the parish of St. Luke, Chelsea. The defendants, Hooper and Pilcher, as sheriff of Middlesex, pleaded, first, not guilty: (a) thirdly, a justification under a writ of fi. fa., issued against the goods of the plaintiff by the third defendant Heenan. Replication, that the writ of fi. fa. was not sued out, and did not issue against the goods of the plaintiff. Issue thereon. The third defendant, Heenan, pleaded only the general issue.

The facts proved at the trial were as follows:—The defendant Heenan had brought an action against Joseph Jarman, the son of the plaintiff in this case, and the writ of summons was served upon the son, and judgment by default obtained against him. A writ of fi. fa. was afterwards sued out upon the judgment, and the writ was indorsed, "The defendant is an upholsterer and bill broker, and resides at No. 3, Prospect Place, Chelsea, and No. 38, Leicester Square." Under this writ, an officer of the sheriff entered the house, No. 3, Prospect Place, and seized the goods which he found in the possession of the plaintiff in the present action. Notice was therefore given to the sheriff by the present plaintiff, who bore the same name as his son, that the goods seized belonged to Joseph Jarman the elder, and not to Joseph Jarman the son; and the sheriff then obtained an interpleader rule, by which, upon the present plaintiff

(a) The second plea was not material in the present case

paying 50*l.* into court. an issue was directed, in which Jarman the elder was made the plaintiff, and Heenan, the execution creditor, the defendant. The issue was not tried; but, it having been discovered that the wrong person's goods had been seized, the 50*l.* paid by the plaintiff into court was paid back to him, with costs. It appeared, that in the writ of summons, and in the *fi. fa.*, and also in the sheriff's warrant thereon, the defendant in the action of "*Heenan v. Jarman*," was described as Joseph Jarman, without any addition. There was no evidence to shew that Heenan, after giving the attorney authority to prosecute the action against Joseph Jarman the younger, had taken any steps personally in the matter. A verdict having passed for the plaintiff, with 20*l.* damages, a rule nisi was obtained by *Talfourd*, Serjt., to enter a verdict for the sheriff on the issue raised by the third plea, and *Byles*, Serjt., also obtained, on the part of the defendant Heenan, a rule nisi for a new trial.

Halcombe and *Shee* Serjts., shewed cause. The point made by the sheriff, in moving for the rule was, that he was not required to take notice that there was more than one Joseph Jarman, and that there being no addition to the name of the defendant, in the action of "*Heenan v. Jarman*," the elder Jarman must be intended to be the person described in the writ of *fi. fa.* It is submitted, however, that the sheriff was bound to execute the writ against the right party, at his peril. The only evidence of the writ having issued against the plaintiff, was, that his Christian name and surname were the same as those mentioned in the writ, but the sheriff ought to have satisfied himself, before he took the plaintiff's goods in execution, that he was the person against whom judgment had been recovered. *Lepiot v. Browne* (a), which was cited when the rule was moved, only decides that where father and son are both called by the same name, and there is no addition to the name, the father, *primâ facie*, shall be intended; but it was expressly held in that case, that any matter that distinguishes the person makes the addition of senior and junior unnecessary. The sheriff, therefore, was not relieved from making the proper inquiries, and the

(a) 1 Salk. 7; See S. C. 6 Mod. 198.

evidence in the action shewed that the judgment was against the son. In *Bac. Abr.* tit. "*Sheriff*," (N 5), it is laid down, that "where the execution is in the generality without mentioning any thing in particular, the sheriff is to make execution of the right thing at his peril, otherwise he will be a disseisor, for he is bound to take notice thereof, and he hath no warrant from the court but to make execution of the right thing." If the sheriff had thought proper so to do, he might have empannelled a jury to inquire in whom the property in the goods was vested, *Roberts v. Thomas* (a). It is true, that it was held in *Cole v. Hindson* (b), that the sheriff was not justified in seizing the goods of Aquila Cole under a distringas against Richard Cole, although it was averred that they were the same person: but the decision in that case turned upon the language of the plea, which did not contain an allegation that the plaintiff was known as well by one name as by the other. The same point was determined in a case where the wrong person had been taken, *Shadgett v. Clipson* (c). These cases will probably be cited on the other side, but they are further distinguishable from the present in this respect, that the process was issued against the right person, although designated by a wrong name. The same observation applies to *Finch v. Cocken* (d), and *Scandover v. Warne* (e). The cases of *Fisher v. Magnay* (f), appears to be no authority against the plaintiff, it having been held that the plaintiff had precluded himself from raising any objection to the misstatement of his name in the writ, by having omitted to take advantage of the misnomer by a plea in abatement or other equivalent proceeding. Here the plaintiff was an entire stranger to the action. In *Bullers's Nisi Prius*, p. 234, it is said, "In an action of trespass against a bailiff for taking goods in execution, if it be brought by the party against whom the writ issued, it is sufficient for the officer to give in evidence the writ of fieri facias, without shewing a

(a) 6 T. R. 88.

(b) *Ibid.* 234.

(c) 8 East, 328.

(d) 2 C., M. & R. 196; See S. C. 3 Dowl. 678.

(e) 2 Campb. 270.

(f) 1 D. & L., p. 40; See S. C. 6 Scott's N. R. 588.

copy of the judgment: but if the plaintiff be not the party against whom the writ issued, but claim the goods by a prior execution, (or sale), that was fraudulent, there the officer must produce not only the writ, but a copy of the judgment: for, in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass; but in the other case, they are not the goods of the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within 13 Eliz., for which purpose it is necessary to shew a judgment." To the same effect is the case of *Martyn v. Podger*.(a) Secondly, with respect to the rule obtained on behalf of the execution creditor. Where a party retains an attorney to conduct his cause, the client is liable as a trespasser for the attorney's acts of misfeazance, although he does not personally interfere. In *Bates v. Pilling*,(b) the attorney's agent, Smith, had signed judgment and taken out execution, not knowing at the time that the debt had been previously paid, and it was held that as Smith and the attorney were to be considered as one person, both Pilling and the attorney were liable as trespassers, although Pilling had done no more than instruct his attorney to apply to Bates for payment of the debt due to him. In that case *Barker v. Braham* (c) was referred to, where *De Grey, C. J.*, in delivering the judgment of the court, says, (d) "Whoever procures, commands, assists, assents, &c., is a trespasser; here, the client commands the attorney, the attorney actually commands the sheriff's officer; the real commander is the attorney, the nominal commander is the plaintiff in the action; so attorney and client are both principals." Upon the same principle a sheriff is liable in trespass for the act of his bailiff, in taking the goods of A. instead of B. under a *fi. fa.* *Sanderson v. Baker*, (e) *Ackworth v. Kempe*; (f) or for an arrest made by the bailiff after the return-day of the writ, *Parrot v.*

(a) 5 Burr. 2631; See S. C. 2 W. Bl. 701.

(b) 6 B. & C. 38; See S. C. 9 D. & R. 44.

(c) 3 Wils. 368.

(d) D. & L. 377.

(e) 2 W. Bl. 832; See S. C. 3 Wils. 309.

(f) 1 Doug. 40.

Mumford.(a) The case of Woodgate v. Knatchbull,(b) is an authority to the same effect. Crook v. Wright,(c) which was cited when the present rule was obtained, makes for the plaintiff, as it was decided that the defendants were made trespassers by the acts of their attorney, the only question being whether there was evidence of a retainer. Here, there is not only evidence of a retainer of the attorney, but of a ratification of his acts afterwards by the client. [*Maule, J.*—What evidence is there of a ratification?] It is submitted that the defendant Heenan adopted the acts of his attorney when he became a party to the interpleader rule. In *Parsons v. Lloyd*,(d) and in *Codrington v. Lloyd*,(e) it was determined that the execution creditor was liable as a trespasser for an arrest under process, which was afterwards set aside for irregularity, and was therefore no process at all; and the same point was previously decided in *Turner v. Felgate*.(f)

Sir *T. Wilde* and *Talfourd*, Serjts., to support the rule for the sheriff. The liability of the sheriff depends upon the fact which the replication puts in issue, viz: whether the fieri facias executed by him was issued against the goods of the plaintiff or not. So far as he is concerned, it was so issued. The sheriff could only look at the directions indorsed upon the writ, and he was bound to obey them. In *Clarke v. Palmer*(g) it was decided that a sheriff was not bound to arrest a defendant upon a ca. sa., the plaintiff's attorney neither having indorsed upon the writ the place of abode or addition of the defendant, nor having given the sheriff any information to enable him to discover the defendant's residence. The plaintiff, therefore, in that case having ruled the sheriff to return the writ, the Court of King's Bench set the writ aside. The indorsement is now a material part of the writ, and if execution had been delayed till the sheriff could summon a jury to decide in whom the property in the goods was vested, he might have incurred the risk of an action, in case the goods had been removed in the meanwhile. The question

(a) 2 Esp. 585

(b) 2 T. R. 148.

(c) R. & M. 278.

(d) 3 Wils. 341.

(e) 8 Ad. & Ell. 449; See S. C. 3 N. & P. 442.

(f) 1 Lev. 95.

(g) 9 B. & C. 153; See S. C. 4 M. & R. 141.

is not what was intended by the party who issued the *fi. fa.* but who was the person against whose goods the writ issued. If there be father and son of the same name, and there be no addition, the father is meant and not the son. The description in the writ, therefore, applied to the elder Jarmain, and his goods were rightly seized by the Sheriff. In *Shadgett v. Clipson*, Lord *Ellenborough*, C. J., says,^(a) "Process ought regularly to describe the party against whom it is meant to be issued; and the arrest of one person cannot be justified under a writ sued out against another." The plaintiff's remedy was a writ *de identitate nominis*. In *Wilson v. Stubs*,^(b) the plaintiff brought a writ of second deliverance against Ralph Stubs, and having obtained judgment, had a writ of *capias utlegatum* to take the said Stubs in execution. Afterwards Ralph Stubs, the younger, brought a writ *de identitate nominis*, and had a *supersedeas* to the sheriff to forbear execution, but the court thought that, in that particular case, the writ and the *supersedeas* thereupon was not warranted, but that the defendant Ralph Stubs, the younger, might have his action of false imprisonment; "for that the defendant being named Ralph Stubs, without addition, shall never be accounted the younger, but always the elder of the two of that name." *Lepiot v. Browne*^(c) appears to be an authority in favour of the sheriff, because he need only look to the party who is *primâ facie* intended. [*Maule, J.*—The plea says, that the *fi. fa.* issued against the goods of the now plaintiff, and the question is, whether it did issue against his goods or not.] The sheriff is bound to execute the writ, and to follow the directions given by the writ, and *Wilson v. Stubs* is a direct authority to shew that the description applied to the elder Jarmain. [*Tindal, C. J.*—You stand upon the form of the writ: but the difficulty is, whether evidence may not be let in to shew who was the person intended. If your right, then the sheriff would be justified in taking the goods of any Joseph Jarmain in the world]. It is not necessary to prove the argument to that extent. The question in this case is, whether the writ issued against the father or against

(a) 8 East, 329.

(b) Hob. 330.

(c) *Ubi supra*.

the son? The father is described, how was the sheriff to know that the son was intended? The writ refers to the judgment, certainly, but the judgment contains no information which would put the sheriff upon an inquiry. The sheriff is entitled to the protection of the court, having obeyed its writ, and if he is in error, he has been misled by the writ itself. The cases cited in Com. Dig. tit. "Abatement," (F. 17, 21); 2 Hawk. P. C. tit. "Appeal," p. 261; Foster, tit. "Homicide," § 12, s. 9, and *Hoye v. Bush*,^(a) taken together, shew that where the father and son bear the same name, and the writ is issued generally, the sheriff must execute it against the father; and if it be executed against the son, and the son resist, and death ensue, the crime would only be manslaughter, in consequence of the inaccurate description in the writ. The words of the issue in the third plea being that the writ issued against the plaintiff, which it clearly did, all question of intention in the mind of the party suing out the writ must be rejected. The sheriff, it is submitted, has made out the affirmative of the issue, and, as a public officer, he ought to be protected. If this action should succeed, the Interpleader Act will become a dead letter.

Byles, Serjt., for the execution creditor. The jury have found that the execution creditor is a trespasser by the act of his attorney; but even if the attorney committed a trespass, it is submitted that Heenan is not a trespasser. Assuming an express retainer to have been proved in this case, the client would not be liable if his attorney took the wrong person or the wrong goods in execution, or, at any rate, he would not be liable in this form of action. The only authority which the attorney had was to prosecute an action against Jarman the younger, and if he issued process against the father, the client is not responsible. In *Barker v. Braham*,^(b) the discussion turned upon the liability of the attorney, but not upon the liability of the client, and, in that case the client had authorized the attorney to proceed against the plaintiff, so that the attorney was acting within the scope of his authority, although he acted irregularly. So in *Bates v. Pilling*,^(c) the

(a) 1 Man. & Gr. 775, 790, n.; S. C. 2 Scott, N. R. 86.

(b) *Ubi supra*

(c) *Ubi supra*.

attorney had received instructions to sue Bates, and Bates was sued after the debt had been paid. In that case, therefore, the attorney acted, though irregularly, within the scope of his authority. In *Balme v. Hutton*,^(a) Mr. Justice *Patterson* says,^(b) “The writ commands the sheriff to take the goods of A.; he takes goods which had been the property of A., and are still in his possession, though, in point of law, they have ceased to be his property, if certain contingent events happen: but no other person at that time has the right of possession: the sheriff, therefore, is not liable to be sued in *trespass* by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of the seizure; neither is the execution creditor liable in *trespass*; but both the sheriff and the creditor, *if he takes the proceeds*, are liable in trover to render the value of the goods to the person whose property they turn out to be.” Here the execution creditor did not receive the proceeds of the sale, and even if he had done so, he would not be liable in trespass. Secondly, there has been no ratification of the attorney’s act by Heenan.

TINDAL, C. J.—One of these points is of great general importance, and therefore we will take some time to consider it.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

TINDAL, C. J.—This was an action of trespass for breaking and entering the dwelling-house of the plaintiff, in which action, the two first defendants, as sheriff of Middlesex, justified, in their third plea, entering the house under a *fi. fa.*, issued against the goods of the plaintiff.” The defendant, Heenan, the judgment creditor, pleaded not guilty only. After a verdict for the plaintiff against the three defendants, with 20*l.* damages, a rule nisi was obtained by the sheriff for setting aside the verdict as to the issue joined on the third plea, and for entering it in his favour, and a rule nisi was also obtained by Heenan, the judgment creditor, for a new trial. It appeared at the trial of the cause, that the defendant Heenan had brought an action against Joseph Jarman, the son of the plaintiff, to recover a debt due to Heenan from

(a) 1 C. & M. 262; See S. C.

(b) 1 C. & M. 272.

the son; that the writ of summons had been served on the son, and judgment by default obtained against him, upon which the writ of *fi. fa.* in question was issued, but that both in the writ of summons and in the *fi. fa.*, and also in the sheriff's warrant thereon, the defendant in that action was named "Joseph Jarmain" only, without any addition or other description. And upon this state of facts, it was contended on the part of the sheriff, that inasmuch as the writ required him to take the goods of Joseph Jarmain, and as the name "Joseph Jarmain," without any addition to shew that the son was intended, does by law necessarily import that the father was meant by the writ, so the sheriff was justified in entering the house to take the goods of the father, as he had done on the present occasion. It is undoubtedly true, that if the father and son have the same name of baptism and surname, and the name of baptism and surname only is stated in the writ, without any addition thereto, *primâ facie* the son shall not be intended. This is the full extent of the observation of Lord *Holt*, in 1 Salk. 7. But it is equally true, that if the action is brought against the son without any addition, and such want of addition is not pleaded in abatement, a judgment obtained in such action against the son, and a writ of execution upon such judgment, is good against him by the name inserted in the writ. Although, therefore, the want of addition imports *primâ facie* that the son is not intended, it is no more than a *primâ facie* intendment; for the son may be the person really intended by the writ. The situation, therefore, of the sheriff, under such a state of circumstances seems to be the same as if he had received a writ against a defendant described by the name of J. S., in the writ, and there appeared, at the time of executing the writ, to be two persons of the name of J. S., in which case there can be no doubt but that the sheriff would be liable if, through inadvertancy or mistake, he took the person or the goods of the wrong J. S. The authorities from the *Year Books*, cited in 2 Roll. Abr. 552, 1. 17. 25 and 30, are clear and express to that point; in the last of which references it is laid down that the sheriff is liable, "though the taking be by the shewing of the party to the suit." And the precise

form of the issue raised on this record leads to the same conclusion. The issue is, whether the writ of fi. fa. was sued out against the plaintiff, that is, Jarmain the father; and the affirmative is upon the sheriff, who pleads that it was so issued. The sheriff rested his case at the trial upon the production of the writ, and upon the fact that the plaintiff had a son of the same name; but that, at the most, would, as we have seen, only prove that *prima facie* some Joseph Jarmain, other than the son, was intended: whereas all the evidence in the case shewed that it was not the father against whom the writ of fi. fa. had been really issued. Even, therefore, if the argument on the part of the sheriff were well founded, that the writ against the goods of Joseph Jarmain might, in some form of pleading, have justified him in taking the goods of the father, whether he was the real defendant or not, we think, upon the present issue, which affirms in substance that he was the real defendant in the action, the verdict must be found against the defendants. As to the writ *de identitate nominis*, which it is contended was the proper and the only remedy for the person wrongfully taken under a writ, it appears upon reference to the writ as set out in Fitz. Nat. Br., and also to the authorities cited from the Year Books under that head in Fitz. Abr. and Bro. Abr., that it was used principally, if not exclusively, in cases where the plaintiff had proceeded to outlawry, and had taken either the body, or the lands or goods of a person bearing the same name with the defendant, but not being the real defendant, and had seized the same into the king's hands. In that case the writ issued, praying for a supersedeas to the sheriff, and that the king's hands might be amoved, and the *Attorney General* was at liberty to plead thereto that he was the person intended. There is great doubt whether the writ applied at all to a case of a simple taking by a plaintiff in a cause, for, in the case cited from Hob. 330(a), the reporter observes, "The court did take a great difference between the cases of the outlawry, and the principal case; being only at the plaintiff's suit, and not at the king's, as in every outlawry the king is interested, and of which principal case no prece-

dent was, or could be shewed." And there appears nothing in the books to shew that if this writ had been sued out, it would have taken away the plaintiff's right of action for damages, for his wrongful arrest, or the wrongful taking of his goods. As to the defendant Heenan, the only question in this case is, whether he is bound by the act of his attorney in giving directions to the sheriff to take the goods of the plaintiff. That the plaintiff in the original action is liable in trespass, if the sheriff by his order takes the goods of a mere stranger in execution, is clear in law, 2 Roll. Abr. 553, 1, 8, 10; and it appears to us, that the direction given by the attorney is a direction given by an agent within the scope of his authority, and binds the principal. The attorney has the general conduct of the cause; he is the only person with whom the sheriff has communication; and in taking a step essentially necessary for the benefit of the client, that is, for the obtaining the fruit of his judgment, we think he cannot be held to have acted beyond his authority, although he has miscarried in its execution. And when it is argued that he cannot be his agent in giving false information, the answer is, that if he be his agent to do the particular act, the client must stand to the consequences, if he acts inadvertently or ignorantly; as in the case of *Parsons v. Loyd*,^(a) where trespass was held maintainable against the plaintiff for causing the defendant to be arrested under a writ which was afterwards set aside for irregularity. It was argued in that case, that the suing out the writ was the immediate act of the attorney, and that he had not been retained to sue out a void or irregular writ, and therefore it was not within the scope of his authority. But it was answered by Chief Justice *De Grey*, "The act of the attorney is the act of his client;" and by *Gould, J.*, "The plaintiff should have employed a more skilful and diligent attorney; for the act of the attorney, in point of law, is the act of the party, the client. For these reasons, we think the present rules obtained both on the part of the sheriff and the judgment creditor must be discharged.

Rules discharged.

(a) *Ubi supra.*

THE UPPER CANADA JURIST.

THE LAW OF PRIMOGENITURE.

“ Whereas the right of Primogeniture, and other principles of the common law respecting the descent of real estate, are not so well adapted to the circumstances of her Majesty’s subjects and the state of society in the western section of this Province, as the laws respecting the distribution of personal estate.” Such is a part of the preamble of the bill brought into the Legislature during its present session, by Mr. Roblin, which is as erroneous in its statements, as is the principle itself, which Mr. Roblin desires to introduce. It is not our intention here, as it would be foreign to the character of this periodical, to enter into any lengthened discussion of the political merits of the law in question, as being in accordance with the spirit of monarchical, and opposed to the spirit of republican institutions, or to shew that the change, which is desired to be made, would foster democratic feeling; at the expense of monarchical; our aim is, to answer the objections which have been urged against the existing law, as being against natural justice, and to endeavour to prove by reason and example, the evils that must result from the adoption of the proposed system of hereditary descent. When we speak of laws being in accordance with natural justice, we speak of laws of that immutable and universal character, which nature has imposed upon mankind in every clime and country, and which have not been, and cannot be, denied: laws that no municipal regulations, no political institutions should violate or abrogate: laws which are bound up with the framework of society, and with the destruction of which, society would cease to exist in a civilized form; which we feel as obligations of nature, and which we are not free to discard or destroy. But we must distinguish between these laws, and laws of social and political regulation, and while the feelings of our nature

are shocked, and every principle of justice and religion outraged by customs, such as prevailed in Sparta, of exposing children of a sickly and infirm constitution to certain death; and among many barbarous nations, of murdering the aged parent, when no longer of use to the state; we cannot discover how laws respecting the disposition of property can be viewed in the same light, nor does history point us out any country or people, in which or among whom, such laws are not dependent upon the nature and constitution of the country itself. If it be found that a system, whether it be one that enforces an agrarian division of lands, or an unlimited acquisition and entail, is peculiarly adapted to the constitution of any country, if it has mainly assisted in the establishment and security of freedom, if it has adapted itself to the spirit and genius of the people, if it has interwoven itself among its institutions, if it has grown with its growth as a nation, and increased with its prosperity, who will be heard to say, that such a system is inconsistent with the sentiments of natural justice? If we turn to history, such is the system which we see was adopted by all those nations among whom property was most respected, and made most frequently the subject of grave and deep deliberation. The Jews, who were ever anxious to prevent an undue acquisition of land, from the belief that they entertained of the evils that might arise from it, even *they* allowed the eldest son to receive *two* portions from the parents, while the others shared equally. The Grecian and Roman republics, opposed as they were to individual rule, could not, from the very nature of their institutions, sanction any law by which the right of one child would be raised above that of another. But there was among them a broad line of demarcation between two orders in the state, and it was the object of their lawgivers that this line should be kept as distinct and marked as possible, and therefore, especially at Rome, the property of every member of the upper order was shared among the body to which he belonged, and there also, property was not in all cases equally divided among the children, for by the Voconian law a certain sum was fixed as the limit which a female was permitted to take of the paternal estate, and although these laws were frequently

evaded, yet their existence is sufficient to sustain our argument, that even among these great republics of antiquity, which have been so often instanced as specimens of free institutions, the right of adapting laws of inheritance of property to the exigencies of their own particular institutions, was acknowledged. If then it must be admitted that every nation has exercised the right of determining the succession to property, according to such rules and regulations as have been deemed essential to its welfare, it is evidently impossible to maintain that the law of primogeniture, which may have been adopted by any nation, in accordance with the spirit of its institutions, is contrary to natural justice, as the law of that nation can be no more unjust in giving all to one, than the law of the Jews in giving a double portion to the eldest son, or of the Romans, in making a division among the higher order, or limiting the amount that a female child might receive. But it is argued, that if the law be not contrary to natural justice, it is not applicable to the age or country in which we live, and that however well it might have been adapted for England in the days of feudal supremacy, it never was suited to the circumstances of this colony, and therefore never should have been introduced, and as the soundness of the reasons for its introduction, merely because it was a part of the law of England, cannot be maintained, it ought not now any longer to be continued. It is undoubtedly true, that the causes which first produced this law in England, in the time of William the Conqueror, have never existed in this country; that the law was never necessary here for the preservation of property, that we never have had to look up to a feudal chief for protection from violence and wrong, that military service had not to be provided, nor infant weakness guarded, nor the strength of the province preserved; but still the institutions of England are our institutions, our laws are based on hers, and the evils that would result from this change in such an important part of our constitution, would be so great in a social point of view, that we call upon our legislators to pause before they inflict such an injury upon the province. If this alteration were made, we should be as mariners at sea without rudder or compass; the first statute of the legislature

of Upper Canada declared that the law of England should be the rule of decision in all questions of property and civil rights, but to what page of the English law could we turn for authorities upon this new system of descents, to what decisions of her judges to dispel its doubts or unravel its intricacies; we must abandon our old accustomed paths, and seek for new lights to guide us in revolutionized France, or republican America. But it may be argued that in abolishing the law of primogeniture, we are abolishing a law of unlimited entail, and so freeing the province of future evils, the magnitude of which increased prosperity would alone disclose. If this in truth were so, we should say that the intention of the Legislature was rightly directed to the subject; but we conceive that there is a wide difference between the two systems, and that while unfettered entail destroys the vitality of commerce, and retards agricultural improvement, the present law of hereditary descent has a totally different effect. We hold unlimited entail in abhorrence: all the advances made in trade and national wealth and power, and most of the improvements in the constitution of England, are owing to its abolition. Lands, under such a system, may descend to the most unworthy proprietor, and generation may succeed generation, each as unwilling or incompetent to cultivate and improve them as the last; and every motive to industry, in the acquisition of property on the one hand, or in the prospect of its loss on the other, is weakened or removed. But these are not its only evils. Domestic duties are invaded, and parental authority disregarded. Children feel themselves no longer dependent, but are ready to indulge in any display of contempt of parental authority, and the fearful consequences that must ensue may ultimately destroy all rule and governance in the state. Blackstone, in the seventh chapter of the second book of his commentaries, gives us the following catalogue of the mischiefs, which fruitfully sprung out of the statute *de donis*: “Children grew disobedient when they knew they could not be set aside; farmers were outstead of their leases made by tenants in tail; for, if such leases had been valid, then under color of long leases, the issue might have been virtually disinherited; creditors were defrauded of their debts: for if a tenant in tail could

have charged his estate with their payments, he might also have defeated his issue, by mortgaging it for as much as it was worth ; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought, of suits in consequence of which our ancient books are full ; and treasons were encouraged, as estates tail were not liable to forfeiture, longer than the tenant's life. So that they were justly branded as the source of new contentions, and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm." That these were dreadful evils there can be no doubt, and although the law of strict entail can be modified to a great extent, as it has been in Scotland, by giving to tenants in tail the power of granting long leases, and requiring the registration of every instrument of entail in some public book of records, yet neither these evils, nor others of an important nature, can be entirely removed. But the law of primogeniture produces no such consequences as these. By it no farmers are ousted of their leases ; no creditors defrauded of their debts ; no purchasers deprived of their estates. There is no fetter on the alienation of property, no bar to parental authority. The eldest son has no security that his father's estate will descend upon him, because he is aware that his father has the power of disposing of it by will, but he knows that the more moral and exemplary his conduct, the more likely it is that the property will not pass away from him ; that as he shews himself a good son and citizen, so will he be more likely to enjoy the paternal acres. The father will be more anxious to leave his estate unencumbered that his son may be placed in a respectable position among his neighbours, when he himself shall be mouldering in the dust ; he will exercise more economy and care to provide for his younger children, that he may not leave them dependent upon the will of their elder brother ; and if these good effects may be produced, if vice and extravagance may be checked, and virtue and prudence encouraged, surely the institution of primogeniture should not be classed with that of entail, and its incentives to preserving industry and frugality confounded with the motives that would make the industry of one generation the pretext for idleness and

profligacy in all that succeeded. But it is said that the rule of division is applicable to personal property, and why may it not as well be applied to real property ; if bank stocks and monies placed out in other securities can be distributed, why may not land be distributed in the same manner ? We think that the answer is obvious. It is of little importance how money in stocks, or in the funds, or invested in other securities is divided, because the mercantile purposes for which in the hands of the father it may have been employed, can just as easily be effected when the same property rests in the united possession of the children. But the same reasoning does not apply to landed property, and instead of the same purposes being answered by a division, a greater deterioration of it would ensue, and agriculture would suffer in proportion as the number of small proprietors increased. This must be with us the most material consideration, as the population of Upper Canada is decidedly agricultural, and as it is partly on that account we are to presume that it is conceived that the law of primogeniture is not so well adapted to their circumstances, as the law relating to the distribution of personal estate, though we are also told in the preamble of the bill, that it is not applicable to the state of society among us, if we can show that the proposed system would diminish, rather than increase, our agricultural prosperity, we shall hardly require any other argument to prove the beneficial nature of the law of primogeniture. There can be no doubt that if the principle, to which the continued existence of the law of primogeniture is opposed, be true, the change which is proposed should entirely destroy the system ; for if it be productive of evil, no part of it should be left, nor should any means be given by which some other system of the like nature, may be substituted in its stead. But the framers of this new law can see the evil in the case of an intestacy, when they can perceive no trace of it where there is a will ; and in what does the difference consist ? If the principle be not just in its nature, why should it be allowed to continue in the one case, any more than the other ? is not its abrogation as a rule of descent a mockery, if it be permitted to remain in operation by the exercise of a disposing power ? or is it hoped, (as has been argued more

than once in a neighboring republic, where the law of primogeniture has been abolished,) that under the new system a devise of all a man's real estate to his eldest son, when he had other children living, would be regarded as evidence of the testator's insanity, and would render his will inoperative and void. It is true that we have now more soil than cultivators to till it; but this is not a state of things which will always continue; and we are not legislating for ourselves only, but for posterity also. It is true that we are essentially an agricultural people, but we are not therefore to pass laws to destroy commercial enterprise and professional spirit amongst us. If we have a vast extent of territory in the province, we know that it is rapidly increasing in value, and that landed property cannot now be as readily acquired as it could have been twenty years ago, and though no restraint is proposed to be put upon the interchange of property, yet it is evident that land which is now in the possession of one proprietor, will then be portioned out among many; and as from the increasing value of property, the acquisition of more will every day become more difficult, younger children will gladly avail themselves of the division, and a small independence, rather than risk their ease and quiet in the varied incidents of trading or commercial life. How would this act upon the general intelligence. If the prosperous state of the agriculture of a country must depend on the capital, intelligence, and skill of those under whose directions the soil is cultivated, the result must be disastrous; for if the system of division were practised, the lands would not be in possession of the capitalists, or persons possessed of agricultural skill. Each succeeding generation would show less skill in the cultivation of the soil than the last; poverty would descend upon the posterity of once wealthy proprietors, and in proportion as their capital and property diminished, must their skill and intelligence be diminished also. For this we have not to rest upon the bare theory, which, however persuasive, never bears the force of authority; we can draw our illustrations from history, and its pages, both in ancient and modern times, can depict for us evils as great as those which we have described, resulting from the introduction of systems, such as that which we are seeking to shut out. Agriculture

of old was not considered as an art; Xenophon in his *Œconomics* says, "every man may be a farmer: no art or skill is requisite; all consists in industry and attention to the execution;" a strong proof that agriculture was not understood in the age of Xenophon, an age in which we know from history that it was at a low ebb, as the division of land among all the children, and the free importation of foreign corn, did not tend to its encouragement as a science. Among the Gauls the same system of distribution produced the same effects; and in Germany, from the same causes, we might look in vain for agricultural prosperity. But it is to France that we must turn, to see the true working of the proposed system. Since the first revolution in that country, their legislators have enacted a law, by which an equal division of the parental property is secured to the children. By this law a person with one child is allowed to dispose of a moiety of his property as he pleases; while the child inherits the other moiety, as a matter of right. If there be two children the parent has only power to dispose of a third of his property; if more than two, only one-fourth is at his disposal; and in case of his intestacy, it is all divided among his children. What has been the consequence of this law? Every person who has had it in his power, has followed a rural life, and almost all the farms in the country have been divided, and subdivided, until agricultural prosperity is almost unknown. If this has been brought about in little more than half a century, what poverty and distress may not another half century bring forth, when the system of division will have proceeded to such an extent, that families cannot be supported on the patches of ground which may be allotted to them, and yet will rather continue their struggle for bare existence, than give up the small patrimony they may call their own. Already the agricultural population forms two-thirds of the whole population of the country, and many of the possessors of the soil have been reduced to a state of the greatest indigence, and have been obliged to resort to a vegetable diet for their subsistence. "*Une partie considerable*," says M. Lafitte, in his "*Reflexions sur la reduction de la rente*," p. 161, "*de la population, ne mange ni pain ni viande, ne se nourrit qui de quelques grossiers legumes, et se couvre a peine de quelques misera-*

bles haillons.” Normandy, under the old regime, was always one of the richest and best cultivated provinces in France, and in it the law of primogeniture had the most extensive operation. Under the revolutionary law, Mr. James Paul Cobbett, speaking of it, says, “I hear on all sides here in Normandy, great lamentations on account of this law. They tell me that it has dispersed thousands of families who had been in the same spot for centuries; that it is daily operating in the same way; that it has in a great degree changed the state of the farm buildings; that it has caused the land to be worse cultivated; that it has caused great havoc among timber trees; and there are persons who do not scruple to assert that society will become degraded in the extreme, unless the law be changed in this respect. I have been assured, that in many families of the owners of land, the several members have come to an agreement with each other to act according to the ancient custom, and thus prevent the parcelling out of their estates, and the extinction of their families. This may now and then take place, but generally it cannot; and it is clear, if the present law remain, the land must all be cut up into little bits; that a farm house must become a rare sight; and that a tree worthy of the name of timber will scarcely be seen in a whole day’s ride.”—*Ride through France*, p. 169. “The population of that country,” writes Mr. Birbeck, in his “Tour in France,” page 34, “seems to be arranged thus: a town depends for subsistence on the lands immediately around it. The cultivators, individually, have not much to spare, because as their husbandry is a sort of gardening, it requires a large country population, and has in proportion less superfluity of produce. Thus is formed a numerous but poor country population. The cultivator receives payment for his surplus produce in sous, and he expends only sous. The tradesman is on a par with the farmer: as they receive so they expend; and thus 50,000 persons may inhabit a district, with a town of 10,000 inhabitants in the centre of it, bartering the superfluity of the country, for the arts and manufactures of the town. Poor from generation to generation, and growing continually poorer as they increase in numbers, in the country, by the

division and subdivision of property—in the town, by the division and subdivision of trades and professions; such a people, instead of proceeding from the necessities to the comforts of life, and then to the luxuries, as is the order of things in England, are rather retrograde than progressive. There is no advancement in French society, no improvement, nor hope of it.” Very nearly similar to the description here given, is the condition of the people of Ireland. The subdivision has been carried on there, notwithstanding every obstacle thrown in its way by the landlords, and hence have arisen so many of the evils which have existed in that country. How different a picture does Scotland present; there the law of primogeniture has prevailed, and nowhere has agricultural science been more successfully cultivated, and in no country has a greater spirit of enterprise characterized the people. Look upon her, and look upon France. Agricultural prosperity, industry, commercial enterprise, are the characteristics of the one—poverty, neglect, want of intelligence and apathy, of the other. Commerce cannot flourish in France, because her agricultural population is too great; agriculture must decay, because the labourer can find no ready market for his commodities, no opportunity of exchanging them for others, which contribute to his comfort and enjoyment. “If a country,” writes McCulloch, “were generally divided into small farms, these effects, which arise from the power of exchanging the produce of agriculture and manufactures, could only take place to a very limited extent. Not being able to employ the best machinery, nor to carry the subdivision of employment to a sufficient extent, a much greater number of labourers would necessarily be engaged in the cultivation of the soil; and there would of course be a proportionably smaller quantity of its produce to dispose of to others. No one will presume to say that the agriculture of France is nearly as well improved as that of Britain; that it is not, indeed, a hundred years behind ours; and yet, while there are more than two-thirds of the people of France employed in this inferior cultivation, less than one-third of our people suffice to carry on the infinitely superior system of cultivation carried on in this country. It is in this single circumstance that the great superiority of our

domestic economy, over that of the French, chiefly consists. We carry on a vastly better system of agriculture, with less than half of the labourers they require to carry on theirs; so that the entire produce of the industry of the other half of our labourers, not engaged in agriculture, is so much clear gain; so much positive additional wealth, placed at the disposal of the people of this country, over and above what we should possess, were our lands divided as those of France, and our agriculture conducted on the same plan. Here is the powerful spring, that has contributed more, perhaps, than any other, to enable us to carry our commercial and manufacturing prosperity, to its present unexampled height; and which makes us advance in the career of improvement, notwithstanding we are burdened with a load of taxes, that would press to the earth the greater population of France. Let us not, therefore, by giving the smallest countenance to any scheme for dividing estates, do anything that may tend to increase the purely agricultural population of the country. The narrower the limits, within which it can be confined, the better will be our agriculture, and the greater will be the surplus produce with which to feed and support the other classes of society; on whose numbers and prosperity, the wealth, power, and glory of the country, must ever mainly depend." We are attached to the law of primogeniture, as one of the best institutions of our father-land. We believe that from it, have mainly sprung that spirit of industry, that has pervaded the whole community of England, and that solid credit, that has enabled her to endure all those struggles, that threatened to cast her down from her place among the nations, and that would have overthrown and destroyed any other nation on the earth. We believe that it has been chiefly instrumental in increasing her commerce in every clime, and in extending her empire to the ends of the world. We believe that it has added to her greatness and prosperity; that it has increased her industry; benefitted her agriculture; united the higher and lower ranks of her people, by causing the younger sons of the nobility, and landed gentry, to mingle with the mercantile and other classes, in the various walks of life; and

prevented any of those divisions among the orders in the state, that would have created unceasing contests and distractions, by their separate rights and privileges; and believing all this, we wish not to see it set aside. It may be, that the change will not materially affect this colony during the present generation, but the time must come when the evil will be felt; when the population will have increased, and the land will be crowded with proprietors. We have not attempted to disclose the mischief certain to arise from the proposed system, from theory alone—we have appealed to history for our proofs; and if history has sustained us, we would ask, whether should we, the people of a British colony, with the law of England for our rule of decision, and her general industry, agricultural prosperity and commercial enterprise for our example, select her as our guide in a matter of such momentous importance, or follow in the path pointed out to us by France and the United States; a path that in the former has led to poverty and wretchedness, and in the latter, has as yet come to no termination, for her people have not been driven to excessive condensation. Let every true patriot pronounce the answer.

POINTS IN PLEADING AND PRACTICE.

NO. II.—ADMISSIONS ON THE RECORD.

Among the various points which are daily brought before the notice of the pleader, there are none which ought to be more carefully considered, than admissions on the record; as they may not only conclusively bind the parties in the suit in which they are made, but may most materially affect their rights in subsequent actions. From the very earliest periods of the history of the common law, it has been considered to be a rule, that whatever is pleaded, and not denied, is admitted; (*a*) and that an admission of this nature on the record, is the highest possible kind of admission, and conclusive against the party making it, so conclusive indeed, that it cannot be disproved; (*b*) but in modern times, a distinction has been taken between the effect of the admission itself, as

(*a*) Plowd. 48; 1 Roll. 864, l. 15.

(*b*) B. N. P. 298; Gilb. Ev. 137.

between the parties to the suit, and its effect with respect to any inferences which a jury may be entitled to draw from it; this distinction having been first raised by Alderson, B., in *Edmunds v. Groves*,^(a) in which he said “an admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if any inference is to be drawn by the jury, they must have the fact, from which such inference is to be drawn, proved like any other fact;” and in a later case,^(b) his lordship stated, that it was not to be taken for granted, that if a particular allegation in that case had been material, and consequently had been admitted on the record, “there was an admission of it *as a fact* to go to the jury.” This view has also been upheld by the editor of *Phillips on Evidence*, 8th edition,^(c) who observes: “The general principles of the doctrine of protestation, as laid down in the old authorities, appear to support the view of the learned judge. When the party was driven to admissions by the rules of pleading prohibiting a duplicity in the issue, the usual practice, for avoiding the being concluded by such admissions in other suits, was, to protest against the truth of such admitted facts; so far as the immediate suit was concerned, it was said that the protestation was of no avail. The rule of Hilary Term, 4 Will. IV., (similar to our rule 44, Easter Term, 5 Vic.,) seems only to have dispensed with the formality of a protestation. If the issue joined be found against the party making such admissions on the record, they are as conclusive, in a subsequent action, as if the facts had been found by a jury.^(d) The rule, that a protestation has no effect in the particular action, seems to mean nothing more than that it can have no effect in putting the protested matters in issue; it contributes, indeed, to one great object in pleading, that of narrowing and ascertaining the point to be tried; but, this being effected, all the surrounding facts set out in the pleading may, for the purpose of trial, be considered as if they were struck out of the record.” This reasoning of the learned

(a) 2 M. & W. 645.

(b) *Bennion v. Davison*, 3 M. & W. 183.

(c) Page 832.

(d) *Holdipp v. Otway*, 2 Wins. Saund. 103, (a) n 1.

editor, can hardly be supported; for, it, as he himself admits, the protestation is of no avail in the immediate suit, but only excludes a conclusion against the party in other suits, why is it, if the facts admitted in the particular action may, for the purposes of trial, be considered to be struck out of the record, that when the issue actually joined is found against the party making such admissions on the record, they are as conclusive in a subsequent action as if the fact had been found by a jury? It must be that the facts admitted, and those involved in the issue, are inseparably connected, and that the issuable facts admitted are to be taken as proved for all purposes whatever in that case. Baron Alderson has said, in the case already cited, that the *issue*, and not the pleadings, is before the jury; but the issue is only joined with reference to the other facts appearing on the record; and the rule of pleading is that a party is concluded by his admissions, even though the jury should find contrary to the fact confessed. This rule is fully exemplified in the case of *Wilcox v. The Servant of Sir F. Skipwith*,^(a) where the court held "that what is agreed in pleading, though the jury find contrary the court is not to regard;" and the same view was taken in the case of *De Pinna v. Polhill*.^(b) That was an action of *assumpsit*, in which the declaration stated that the plaintiff was the composer and writer of the music and poetry of an opera, called "The Rose of the Alhambra," and as such composer and author, had a right to the music and poetry of the said opera; and that in consideration of the premises, and that the plaintiff would sell him such right for three hundred guineas, the defendant promised to buy it of him, but that he had not done so. The only plea on the record was the general issue. The agreement consisted of two letters, which were mutually signed by the parties, and exchanged. On behalf of the defendant, it was objected, that there was not a valid sale of the copyright; but Tindal, C. J., before whom the cause was tried, refused to entertain this defence as admissible, on the state of the record;^(c) and he further ruled that by the pleadings the authorship of the poetry was admitted, although it was elicited

(a) 2 Mod. 4. (b) 8 C. & P. 78. (c) *Barnett v. Glossopp*, 1 Bing. N.C. 633

from of one of the plaintiff's witnesses on cross-examination, that one of the songs was written by a Mr. Fitzball ; holding that a denial of the promise was not a denial of that on which it was founded, and that the defendant should have pleaded that the plaintiff did not sell, or that he had not the right, or that he was not the author ; and that as he had not done that, he must be taken to have admitted these facts as far as the jury were concerned, who had to decide on the issue. In *Frankum v. the Earl of Falmouth*,^(a) the plaintiff alleged his possession of a mill, and his right, by reason thereof, to the use of water, which the defendant wrongfully diverted ; and not guilty being pleaded, Patteson, J., said, " On this issue I should not have received evidence that the mill did not exist. The plea admits its existence ; " and the same point is decided in *Bonzi v. Stewart*.^(b) If, then, the jury cannot be allowed to draw any inferences contrary to the facts admitted on the record, even when those facts, so admitted, are disproved, surely they must be at liberty to draw any inferences from the facts admitted consistent with the issue : and proof of them must be clearly superfluous, as the opposite party cannot be allowed to deny them. There has been much difference of opinion upon this subject, between the Court of Exchequer and the Courts of Queen's Bench and Common Pleas ; the decisions in the former having been mostly adverse to the judgments pronounced in the latter courts ; and on the examination of the cases in which the difference has arisen, we would first notice that of *Cowlishaw v. Cheslyn*,^(c) which it is somewhat remarkable, though exactly in point, was not referred to in *Edmunds v. Groves*, nor *Bennion v. Davison*. It was an action of trespass *quare clausum fregit* ; to which the defendant pleaded, *inter alia*, that in 1762, one Anne Cowlishaw was seized in fee, and being so seized, by a deed, lost by time and accident, granted a right of way. The plaintiff, in his replication, traversed the grant. Upon the trial, there was conflicting evidence as to the exercise of the alleged right of way. The plaintiff offered evidence of old deeds, and of a will, to shew that Anne Cowlishaw had only

(a) 2 A. & E. 452, 456.

(b) 4 M. & Gr. 295.

(c) 1 C. & J. 48.

an estate as a co-trustee with one Farnall, in trust, for Anne Cowlshaw's son, who, at the time of the supposed grant, was a minor; and he contended, that this evidence was admissible on the issue in question, for the purpose of shewing that Anne Cowlshaw was not likely to have made the grant, not having had any legal right so to do. The defendant's counsel objected to the evidence, on the ground that Anne Cowlshaw's seisin in fee was admitted on the record, and that the plaintiff was estopped, by the state of the pleadings, from giving any evidence to negative that fact. The judge, however, who presided, Mr. Baron Garrow, received the evidence, reserving the question of its admissibility for the opinion of the court above; and in summing up, directed the jury to consider whether there was such evidence of the use of the right of way, as to lead them to suppose that Anne Cowlshaw had made the grant in question; and he told them that they might assume, for the purposes of their verdict, that she had a legal right to make such grant. A verdict was rendered for the defendant, and upon cause being shewn against a rule which had been obtained, to enter a verdict for the plaintiff or for a new trial, it was held, that the evidence offered to disprove the seisin of Anne Cowlshaw was not properly receivable; and that therefore, the learned judge was perfectly correct in directing the jury to presume, for the purposes of their verdict, that Anne Cowlshaw was seized in fee. "It was competent for the plaintiff," said Baron Vaughan, delivering the judgment of the court, "to traverse either the seisin of Anne Cowlshaw, or the grant by her. The latter is traversed, and therefore it seems to me, and to the court, that it must be taken against the plaintiff, conclusively, and that she was seized in fee. But it was contended for the plaintiff, that evidence was admissible, not to disprove the seisin of Anne Cowlshaw, but as an ingredient to rebut the existence of the grant, which was a mere presumption of fact; because, if she had no authority to grant, it was unlikely, under such circumstances, that she should have made the grant. It is a satisfactory answer to this argument, that the plaintiff is estopped, by the state of the pleadings, and therefore cannot be received to contradict that which is admitted on the record." In *Blewett*

v. Tregonning, (a) Lord Denman said that he did not think that this case was much considered ; but subsequent cases, particularly *Bonzi v. Stewart*, (b) *Bingham v. Stanley*, (c) and *Robins v. Viscount Maidstone*, (d) confirm the same principle. In *Bingham v. Stanley*, Lord Denman said, “In *Edmunds v. Groves*, (e) the plea stated not only that the plaintiff took the bill without consideration, but also that *he knew of the illegality* ; and that knowledge was traversed by the replication. No doubt according to all rules of pleading, whether in actions on bills of exchange, or any other cause of action, where an affirmative allegation is made by the defendant, and denied, the onus of proving it is on him. The affirmative as to the plaintiff’s knowledge was clearly alleged by the defendant, and therefore he was rightly put to prove the allegation at the trial. In the other case, of *Bennion v. Davison*, (f) the allegation in the declaration, which was decided not to be admitted by the plea, was an *immaterial* allegation, and the decision of the court is put expressly on that ground ; though my brother Alderson says, that “it is not to be taken for granted, that if it had been material, there was an admission of it *as a fact* to go to the jury.” Upon full consideration, we cannot agree with the doctrine thus stated. We think that an admission made in the course of pleading, whether in express terms, or by omitting to traverse what was before alleged, must be taken as an admission for all purposes of the cause, whether the facts relate to the parties or third persons ; provided the allegation so made be material. We find no authority to the contrary ; and indeed in former times, before the new rules, such admission, in the absence of a protest, estopped the party even in another cause from disputing the fact so admitted.” And although the doctrine so broadly laid down here is qualified by Lord Denman in *Robins v. Viscount Maidstone*, (g) yet in this latter case he still dissents from Baron Alderson’s view, and looks upon a material fact admitted in the course of a pleading, as admitted “for all the purposes regarding the issue arising on that

(a) 3 Ad. & El., 579.

(b) 4 Man. & G., 295.

(c) 2 Q. B., 117.

(d) 7 Jurist, 694.

(e) 2 M. & W., 642.

(f) 3 M. & W., 179.

(g) 7 Jurist, 694.

pleading ;” and the same learned judge, in *Howard v. Gossett et al.*(a) gave the jury to understand, that when a fact is admitted as to one issue on the record, and denied as to another, although the admission on the one issue is not evidence on the other ; yet if the jury find both issues for the plaintiff, they may, in estimating the damages on the whole case, take into their consideration what appear on the whole case to be the real facts of it. And in *Holt v. Miers*,(b) in which the plaintiff wished to give in evidence as proof of certain facts, certain statements made in the defendant’s plea, which were not denied in the replication, which denied only other parts of the plea, and in which there had been a trial, but no judgment ; Lord Abinger, in rejecting the evidence, said, “if there had been a judgment between the same parties touching the same matter, I am not prepared to say that I should have rejected the evidence.” And also in *Lloyd v. Walkey*,(c) Coleridge, J., would not allow the defendant to go into evidence to disprove a statement admitted by his pleading. In addition to the cases of *Edmunds v. Groves* and *Bennion v. Davison*, the case of *Smith v. Martin*(d) supports the view taken by the Court of Exchequer against that taken by the Queen’s Bench, although Lord Denman, in *Howard v. Viscount Maidstone*, says that *Smith v. Martin* is not a conflicting decision. In *Smith v. Martin*, to a declaration on a promissory note by the indorsee against the maker, the defendant pleaded that the note was indorsed and delivered to the plaintiff by his indorser, in violation of good faith, and in fraud and contempt of an order for referring the claim of that indorser to arbitration ; and that the plaintiff took the note with a full knowledge of the premises. The plaintiff replied that he had not, when he took the note, any knowledge of the premises in the plea mentioned ; and upon issue thereon, it was held, that the defendant was bound to begin at the trial, and to prove the plaintiff’s knowledge of the fraud ; and that the plaintiff was not bound in the first instance to prove consideration for the indorsement to him ; and upon the court

(a) 1 Car. & M., 380.
(d) 9 M. & W., 304.

(b) 9 C. & P., 191.

(c) 9 C. & P., 771.

discharging a rule for a new trial, Alderson, B. said "I must say it seems to me unjust and unreasonable to prevent a party, by the rules of pleading, from denying a particular fact, and yet to call upon the jury to treat that fact as proved. If that be the law, then a double replication is of the very essence of justice. Personally, I should desire to have the matter fully discussed; but as the opinion of this court is at variance with that which had been expressed by the Court of Queen's Bench, the difference can be settled only in a Court of Error. I have considered the decision of the Court of Queen's Bench, with every possible respect; but I must say it is not satisfactory to my mind, and appears to me to present many difficulties." But it is submitted, that this case does not bring up the point in issue between the two courts. Before the new rules of pleading, on non assumpsit pleaded, and notice to prove consideration given to the plaintiff, the defendant would not have been allowed, after proof of the fact as stated in his plea here, and admitted in the plaintiffs replication, to have called upon the plaintiff to prove the consideration that he had given for the note; because, knowledge of the fraud being essential to invalidate the plaintiff's title, it would have been incumbent on the defendants to have proved it, as the onus probandi would have been on him: and without such proof of knowledge, the plaintiff's indorsement would have remained unimpeached. The point at issue between the courts would have been raised, if the the knowledge of a fraud committed had been brought home to the plaintiff, which alone might not have been sufficient to destroy the indorsement to him, and there had been no evidence offered of the committal of the fraud, the defendant relying upon the statement in his plea, not denied by the plaintiff's replication to prove it; and then we conceive the admission would have been sufficient, and would, with the proof of knowledge, have prevented the plaintiff's recovery, without any evidence being offered that the fraud alleged had been actually committed. But it is further conceived, that the ground of injustice to the party, as being precluded from double pleading, which seems in the case cited to have so much weight with Baron Alderson, is not tenable; as the plaintiff might, by the replication *de injuriâ*, (the defence being in excuse

and not in discharge), have put the defendant upon proof of all the matters alleged in his plea, and was not obliged to take issue upon the particular point which he selected. There could therefore be no hardship to the plaintiff, as he had narrowed his ground by his own mode of pleading. But the judgment of the Court of Exchequer, in *Edmunds v. Groves*, already referred to, has been admitted by the same court not to be law, in *Carter v. James*.^(a) That case was an action on a covenant in a deed to pay 600*l.* with interest, and the defendant pleaded by way of estoppel, a former suit in the Queen's Bench, brought by the present plaintiff on a bond for 1200*l.* with interest, being a sum secured to the plaintiff by a mortgage of the same date; that the defendant pleaded in that action, that 124*l.* 15*s.* 6*d.* being due to the plaintiff, it was corruptly agreed that the defendant should pay more than the lawful interest for that amount; which principal and interest being afterwards unpaid, it was agreed, that to secure them and other debts, the defendant should give his bond, which was done; that the plaintiff traversed that the bond was given in pursuance of such corrupt agreement; which issue was found for the defendant, and judgment given for him, the plea concluding with an averment of the identity of the mortgage deed in the former suit, and that now declared on. The court gave judgment against the estoppel, holding, that although the protestando was done away with by the new rules, the principle still continued, and that any fact that was admitted for the purposes of a particular suit, and upon which no verdict or judgment was given, was saved as to subsequent suits, in the same manner as it would have been by a protestation under the old form of pleading; and Alderson, B., on his judgment in *Edmunds v. Groves*, that "the *pleadings* are not before the jury, but only the *issue*, being referred to, said, "a different doctrine was laid down by the Court of Queen's Bench, in *Bingham v. Stanley*,^(b) namely, that an admission in the course of pleading, must be taken to be an admission for all the purposes of the cause, and I am quite satisfied that that decision was right, although I do not say that I agree with the reasons given for it. Most of the cases on this point were cases of actions on bills of exchange, in which the aver-

(a) 8 Jurist, 912.

(b) 2 Q. B. 117.

ments in the declaration are susceptible of two meanings. Indorsement, for instance, may mean either an indorsement by the party writing his name, or an indorsement for valuable consideration : and if you introduce into the declaration the facts admitted in the plea, you give the averment of the fact of indorsement a different meaning, according to those facts. If, for instance, the plea avers the bill to be an accommodation bill, that shews that the averment of indorsement in the declaration must mean an indorsement for a valuable consideration ; and therefore, if that fact be admitted by the replication, it is merely an explanation of the original averment of indorsement in the declaration, and throws on the plaintiff the onus of beginning. This consideration will explain the difference between the decisions of the several courts. With respect to *Edmunds v. Groves*, I am the only surviving judge who gave judgment in that case, and am of opinion that the decision cannot be supported. If the allegation of notice was essential to the validity of the plea, I should say it was rightly decided : but if the plea were good, with an allegation of want of consideration alone, it would be different. In order to make a promissory note suable on, which has been given for a gaming debt, it must be shewn both to have been given without fraud, and also for a valuable consideration ; the failure of either of these would render it invalid. If this view be correct, the decision in *Edmunds v. Groves* is wrong." It is submitted, therefore, upon the whole of the cases, that the principle established by the decisions of the Court of Queen's Bench, is the correct one ; and that the admission of a material fact in a pleading, dispenses with proof of that fact, as far as regards the issue raised upon the pleading in which that fact is alleged. In contending for this principle, however, it must not be supposed that we conceive that an admission made in one count or plea, may be used in evidence to support or destroy another count or plea ; as that is an extension or rather perversion of the principle, which no authority can be found to warrant, while there are express decisions to the contrary, in *Harrington v. McMorris*,^(a) *Firmin v. Crucifix*,^(b) *Montgomery v. Richardson*,^(c) and *Gould v. Oliver*.^(d)

(a) 5 Taunt. 228. (b) 5 C. & P. 98. (c) 5 C. & P. 247. (d) 2 Man. & G. 208

IN CHANCERY.

FRIDAY, 22ND NOVEMBER, 1844.

CLARKE V. MANNERS.

Application for payment of money out of Court, on plaintiff dismissing his bill. Motion, granted.

Esten, for defendant, moves for payment of money out of court. It appeared that a bill had been filed, and a special injunction obtained some time ago, to restrain the defendant from proceeding to enforce a verdict, entered upon an award made in a cause depending in the Court of Queen's Bench, on the ground of fraud, as well on the part of the arbitrators, as of the defendant. The defendant had moved to dissolve this special injunction, on the ground of irregularity, in not bringing the money awarded into court; and upon that motion the money was ordered to be brought in, or that in default the injunction should be dissolved. It also appeared in the present discussion, that the defendant had, during the last term of the Court of Queen's Bench, moved for, and obtained an attachment against the plaintiff and his solicitor, for contempt, in taking proceedings in this court, the submission and award having been made rules of the Court of Queen's Bench, and the submission containing a clause not to file a bill in equity. (a) The plaintiff and his solicitor, under pressure of this attachment, dismissed the bill in this court and the defendant now moved that the money which had been brought into court on the issuing of the injunction, should be paid out to him. No answer had been filed, and the only evidence before the court was the affidavit on which the injunction had been granted.

Esten—The money was paid in because the court had prevented the defendant from levying it at law. It now appears that the injunction ought not to have been issued or applied for. The defendant should therefore be placed in the same situation as if he had not been estopped. It was the injunc-

(a) *Manners v. Clarke*, 1 U. C. Jurist, Reports 191.

tion that constituted the contempt, and not the filing of the bill. The motion can be resisted only on the argument that the bill was not dismissed on the merits, and that the plaintiff may possibly file another bill, under which the defendant's right to the money may be thoroughly sifted. This is however too great an uncertainty. The plaintiff must first obtain the leave of the other court to file his bill: then, if he get that leave, he must file his bill, which is not a certain event; and lastly, if he should file a bill, non constat he has merits. Again, this motion is not conclusive on the plaintiff's right, because he may hereafter recover the money. Prima facie, the defendant is entitled to it, having a judgment, or what is equivalent to one. Again, there is no jurisdiction, to keep the money in court, because there is no bill in court. As to the party against whom the bill is dismissed, the cause is at an end; and it is he who tries to keep the money in court; there is jurisdiction only to order it to be paid out. *Wright v. Mitchell*, 18 Ves. 292; 1 *Smith's Chancery Practice*, 60; *Franklin v. Thomas*, 3 Mer. 235; in this last case, though, the bill was dismissed for want of prosecution, and it might therefore be contended, that the plaintiff's voluntarily allowing his bill to be dismissed, argues want of merits, yet the principle of the case applies.

Blake, contra.—No precedent can be found for this motion: this application should have been made on petition, not on motion; a gross sum of money is not to be paid out of court on motion, but on petition; interest only on gross sum paid out on motion. *Mad. Cha. Prac.* 645, 647; 4 *Mad. Cha. Rep.* 228, and *V. C. Leach*, on several occasions, admits, payment of money out of court on dismissal of bill, but then the title to receive it must be the result of former proceedings in the cause. *Wright v. Mitchell*, 18 Ves., is the result of *Roundell v. Currie*, 6 Ves. 250; and this, of *Lord Winchelsea's case*, *Vin. Ab.* 1 *Eq. Ca. Ab.* 2: the case in 18 Ves. 292, where the application was on *motion*, was in 1811; the case in 4 *Mad.* was in 1819. Where the court has ordered money to be paid out of court before decree, it is always because a clear title to it has been made out by the pleadings or evidence. Here, there is not such a state of facts as to make the defendant's title clear; the presumption

is rather against his right, from the statements contained in the affidavit filed on motion for the injunction. The case of Wright & Mitchell is a strong authority against this motion : there the money was paid to the person who would have had and held it independently of the bill. Without the bill, the money would have been paid to the assignees of the lease, that is, to the person *who had paid the money into court*. If, in the present case, the dismissal of the bill was a voluntary act, then there would be some semblance of reason for the motion, but it was the result of the opposite party's proceedings in the other court. The contempt committed was first the act of the plaintiff in filing a bill, and then that of the solicitor in issuing an injunction. The submission contained a clause not to file a bill. Under English practice, the court of law, instead of granting an attachment, would either strike that clause out of the submission, and enquire whether it was proper for the party to file a bill, or would refuse an attachment against him if he had filed one. *Braddock v. Thompson*, 8 East. 344 ; *Charlie v. Nichols*, 14, Ves. ; *Lord Littledale v. Lord Lonsdale*, 2 Ves. Jun. And those cases proceeded on the ground, that although the award may be good on the face of it, there might yet be fraud sufficient to impeach it, which it might be possible to get at by bill and answer, but which the affidavit of the arbitrators might not only not disclose, but contradict ; and that by a mere naked and general allegation of the award being made in good conscience and equity. If it be law that such a loose affidavit of the arbitrator's must prevent the Court of Queen's Bench interfering, there is no reason to infer, that the person dismissing his bill under pressure of the attachment which has been issued here, has no equity. Defendant has a strong presumptive case of right to the money from the facts which have been brought before the court on affidavit, and as he paid it into court he should have it. The investigation to ascertain who was truly entitled to the money was prevented by the other side. The defendant procured the money to be paid into court, as a guarantee to abide the decree of the court, and if he then takes steps to prevent the cause being brought to a hearing, how can he ask

for the money, or pretend to be justly entitled to it? Plaintiff does not ask to keep this money in court, on this ground that he intends to file another bill, but since defendant prevents investigation, that this court should not assist him, but leave him to prosecute his legal remedies; that is, by attachment or action, in either of which cases plaintiff will have an opportunity of contesting the opposite party's proceedings in every stage, and on every ground.

Esten, in reply.—There is precedent for this application, and Wright and Mitchell is a case in point. As to the petition being the proper course, it is only said that such is an advisable course, but there is no rule to that effect; besides, the cases cited were applications in the course of the causes, *before the accounts were taken, and before the master's report*. The orders are then made upon a full statement of facts, and on the presumption that there will be enough after the accounts taken to authorize such share to be given to the party applying. Petition is used in cases of difficulty, and requiring care; but here the case is simple. The bill, in this case, admits the legal title of defendant. [V. C.—The defendant appears to act inconsistently. He asks that the money may be ordered to be paid into court, and submits to the jurisdiction of this court; he then goes to the other court, and shows that the plaintiff has no equity.] The application to have money paid into court was not voluntary, but the result of the plaintiff filing his bill, and getting an injunction. The defendant wished to have the injunction dissolved, but said, if the court will not do that, then place the money in court; as the plaintiff has no legal title, on his own shewing in his bill. The case cited in 18 Ves. is not founded on that in 6 Ves.; this latter is a case of abatement. Cases of abatement and dismissal differ:—in the former, the suit abates by accident, and affords no presumption of title, one way or the other; but every case of dismissal rises a presumption against the plaintiff. If the money, says the plaintiff, must be paid out of court, it must go to the party entitled; the defendant's title is the *primâ facie* one. The plaintiff cannot be allowed to say that the defendant unconscientiously *drove him* out of court. The attachment was against the *solicitor*, and if he

chose to remain in prison, the suit might have gone on; his dismissing the bill was to extricate himself from difficulty. The plaintiff has no right to resist, or rather no opportunity of resisting, this motion, for he is no longer before the court, after the dismissal of his bill.

V. C.—I can only look to the *legal* rights of the parties now: no matter what the presumptive ground of fraud may be.

Tuesday, 26th November.

Order granted;—his honour observing, that as the money must be disposed of, the party having the legal right to it must get it.

This order was appealed from.

FORD V. STEEPLES.

Motion to enlarge time for payment of mortgage money.

Esten moves to enlarge time for payment of mortgage money, on affidavit that defendant has effected a sale of the mortgaged premises, for 300*l.* (the mortgage money payable being only 250*l.*), and that he expects to receive payment of the purchase money in full in two or three months.

Order granted for six months' further time, on usual terms of payment of arrears of interest and costs, and that it be referred to the master (in case the parties differ about the same), to compute subsequent interest and tax plaintiff's further costs.

IN BANKRUPTCY.

TUESDAY, 19TH NOVEMBER, 1844.

IN RE MERRITT ET AL.

Commission of bankruptcy superseded, on application to the Vice-Chancellor in the first instance and not by way of appeal.

On a petition, presented on a former day, praying that a commission of bankrupt intended to be issued against Merrit and others might, when issued, be superseded, and that in the meantime advertisement in the *Gazette* might be stayed, and seizure of the bankrupt's property by the sheriff be prohibited, an order was granted to stay publication and seizure. The petitioner in bankruptcy (Mittleberger), conceiving that the Court of Review had no power to adjudicate or act in matters of bankruptcy, otherwise than as a Court of Appeal (under 7th Vic. ch. 10), and had therefore exceeded its jurisdiction in granting the order to stay notice and seizure, applied to the Court of Queen's Bench during this present (Hilary) term, and obtained a rule nisi for a writ of prohibition, directed to his honour the Vice-Chancellor, and others therein named, to prevent any proceeding being had and under the said order. The commission of bankruptcy having issued,

Esten now moved on petition with notice, that the commission be superseded. He put in an affidavit of the proceedings had, and of service of the petition on Messrs. Burns and Mowat, who had refused to accept service of the petition, as not being solicitors for the petitioning creditor in obtaining the commission of bankruptcy. Some discussion followed with the court to shew that Messrs. Burns and Mowat having appeared when the petition was first presented, and the order for suspension of publication was made, and having thus acted in part as agents for the petitioning creditor, must be considered as agents for all purposes, especially in the present matter, which was connected with and arose out of the former; and so his honour held.

Esten then proceeded to apply, in support of the petition, the same arguments as were already before the court in this matter on a former occasion, viz: first, it was not proved that Merritt was a trader; secondly, if he were a trader, that he was not such at the time of the alleged act of bankruptcy; thirdly, the petitioning creditor's debt was satisfied and extinguished by the articles of agreement dated 20th August, 1839; and fourthly, the petitioning creditor, Mittleberger, acquiesced in that deed and compromise.^(a) The learned counsel then argued as to the power of the inferior judge to supersede a commission of bankrupt, and discussed generally the question whether all the original powers of the Court of Review in England are vested in the commissioners under 7 Vic. ch. 10, and whether the Court of Chancery possesses only an appellate jurisdiction in bankruptcy. The argument, which from the fact that some of the functions of the Court of Review in England are performed by our inferior courts, infers that the Court of Chancery has only an appellate jurisdiction, is erroneous. The opposite conclusion is the just one, since it is to be inferred, that all is expressed which was intended to be given to the inferior tribunal. It was for convenience that the powers referred to were given to the commissioners, subject to appeal, and not to reduce the Court of Review to one of appeal merely. The power of the inferior court to supersede, rests upon two grounds; first, its power to issue the commission; and secondly, the assumption that the Court of Review is only a Court of Appeal; (the latter was fully discussed in B. R., on the motion for a prohibition). The commission is not under the great seal; the argument derived from the fact of the commission in England being only revocable by the guardian of the great seal, therefore, does not apply. If an argument founded on analogy is to be used, it applies differently;—as the power to issue the commission has been given by statute to the Court of Review in England, so in like manner it may have been given to the Court of Review here; besides it is absurd to suppose that the court above had

(a) These arguments are not dwelt upon, as they will appear in the report of the proceedings in the Queen's Bench, on the motion for prohibition.

not authority to do what the court below can, and which it is conceded the former can do on appeal. The issuing of a commission, under 7 Vic. ch. 10, is not of such importance as to *infer* the power of superseding; the issuing of it in certain cases is not of discretion, but of course. The commission here is a mere warrant to the sheriff, and presupposes rather than involves the adjudication; the commissioner has in fact no power to issue a commission in the sense in which that word is understood and used in England: the superseding, on the other hand, may involve many interests, and depend on conflicting testimony. The arguments for the other side, rest upon the manifest intention of our act to assimilate the system here to that in England; the variations being dictated by a desire for economy and dispatch:—the adoption into our act of the 24th clause, 4 & 5 Victoria (British act), and the improbability that an appeal should be given only on a point which is final, and disposes of the bankruptcy itself; that the 68th clause of 7 Vic. ch. 10, which alone gives the power of appeal, contemplates proceedings only between the assignees and the creditors.

Sullivan followed on the same side.

Friday, 22nd November.

Judgment given.—The Vice Chancellor considers the service of the petition good.

Next as to the requisites to support the commission.—First, the trading: although many of the acts set forth in the affidavit upon which the commission issued, are by no means acts of trading, yet there is sufficient to support the trading. Secondly, the debt: that is positively sworn not to exist; the affidavit in support of it, is so general as hardly to be sufficient to sustain the commission, and against that affidavit are a positive affidavit and a judgment; besides, the affidavit on which the commission issued is not now proper evidence.

Commission superseded.

CASES IN THE ENGLISH COURTS.

WARWICK V. FOULKES.

12 Mee. & W. 507.

To an action of trespass for false imprisonment, the defendant pleaded, by way of justification, that the plaintiff had committed a felony. At the trial his counsel abandoned the plea, and exonerated the plaintiff from the charge :—Held that it was not a misdirection in the Judge to tell the Jury that the putting of such a plea on the record was a persisting in the charge contained in it and was to be taken into account by them in estimating the damages.

Trespass for false imprisonment, in causing the plaintiff to be taken into custody, and conveyed to a police-office on a charge of felony.

Pleas, first, not guilty ; secondly, that before the time when, &c., the defendant was possessed of certain buildings and premises, and of certain goods and chattels therein being, and that the plaintiff, together with one James Thomas Croke, broke and entered the said buildings, &c., and then feloniously stole, and seized, and took the said goods and chattels from out of the said buildings, without the knowledge and against the will of the defendant, and carried away and converted the same to his own use, whereupon the defendant, having cause to suspect and then suspecting and believing that the said goods and chattels of him, the defendant, had been so feloniously stolen, &c., inasmuch as the plaintiff, together with the said James Thomas Croke, had been seen just before lurking about the said buildings, caused the said plaintiff to be taken into custody by the said police constable, and in so doing the said police constable did then gently lay his hand upon the plaintiff, under colour of the said charge of felony, as in the declaration mentioned, in order that he might be conveyed, as soon as conveniently could be, before some or one of her Majesty's justices of the peace, &c., to be dealt with according to law, as he lawfully might for the cause aforesaid, &c.

Replication de injuria.

At the trial, before *Rolfe*, B., at the Middlesex sittings in this term, the plaintiff having proved his being taken into custody by the defendant's orders, the defendant's counsel stated, that he should offer no evidence in support of the plea

of justification, as the plaintiff had taken the defendant's goods under a bona fide but mistaken claim of right, and that the putting of the plea upon the record was to be considered the act of the pleader rather than of the defendant. *Rolfe*, B., in summing up the case, told the jury that the plaintiff's case having been proved, it was a question of damages merely, and that, although the plea had been explained and apologized for, still the putting of such a plea upon the record was a matter to be taken into account by the jury in estimating the amount of damages; that such conduct was a persisting in the charge of felony; that although the defendant's counsel had said it was the act of the pleader, still, if the plea had been found for the defendant, the plaintiff might have been indicted upon it at the Central Criminal Court. The jury having found a verdict for the plaintiff, damages 75*l.*,

Jervis now moved for a new trial on the ground of misdirection. The plea having been abandoned at the trial, the learned judge ought to have told the jury to pay no regard to it, which is the usual practice in such cases. If the plea were placed upon the record maliciously, it might have formed the ground of a distinct action, and therefore ought not, under the general issue, to have been made a ground of increasing the damages in this. [*Parke*, B.—No one ever heard of an action being brought on such a ground.] It is submitted that an action on the case could be maintained, if such a plea were proved to have been put upon the record maliciously. Suppose the defendant had justified the arrest on the ground of a suspicion of felony, founded on reasonable and probable cause, could it be said that the plaintiff would be entitled on that account to additional damages, upon his negating the felony, and shewing malice on the part of the defendant?

Lord ABINGER, C. B.—I think the learned judge was right, and that no rule ought to be granted in this case. The putting this plea on the record is, under the circumstances, evidence of malice, and a great aggravation of the defendant's conduct, as shewing an animus of persevering in the charge to the very last. A justification of a false imprisonment, on the ground that the defendant had rea-

sonable and probable cause to suspect that the plaintiff had been guilty of felony, is very different; such a justification is in the nature of an apology for the defendant's conduct. And although it was very proper in the present case to tell the jury that the defendant's counsel apologized for the conduct of his client, still that apology came too late. It was one which seemed to be made for the purpose of screening the defendant from having to pay damages.

PARKE, B.—I am of the same opinion. If the putting a false charge on the record by way of plea is to be considered in the same light as indicting the plaintiff without reasonable or probable cause, the direction of the learned judge at *nisi prius* would be wrong. But, looking at the transaction as it now stands, I think he was right. A man is taken up on a false charge of felony; surely he has a right to give evidence to show that it was not one lightly made and soon abandoned, but that it was seriously made and persevered in to the last moment. As to the damages being excessive, these are cases in which large damages are in general given, and properly so; if people choose to settle private disputes by giving others into custody, they must take the consequences.

GURNEY, B., concurred.

Rule refused.

THE
UPPER CANADA JURIST.

THE LAW OF DOWER.

There is no branch of the law, in Upper Canada, that requires more to be reformed than that relating to dower, and yet there is hardly any part of it that has received so little of the attention of the legislature, for, with the exception of various provisions made for the form of barring dower, there has been but one statute in which dower has been mentioned, with any view to an alteration in the law respecting it, since Upper Canada became a distinct province. By 4 Will. IV., ch. 1, sec. 13, it is enacted, that where a husband shall die beneficially entitled to any land, for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land; and by section 14, that when a husband shall have been entitled to a right of entry or action in any land, and his widow would have been entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof: provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced; section 15, abolishes dower *ad ostium ecclesiæ*, and *ex assensu patris*; and section 44, restricts the recovery of arrears in dower, or damages in respect of arrears to a period within six years of the commencement of the suit. These provisions are similar to provisions introduced into the English Dower Act 3 & 4 Vic. ch. 105, except, that while the greater part of that act provides for the

removal of the restraint upon the alienation of property, which the right of dower always imposed, by giving the husband the power in many cases of preventing dower attaching, without resorting to any of those conveyances which had been before used for that purpose, the provincial statute increases the difficulties of alienation, by placing an impediment where none existed before, and making no provision for the removal of those restraints, which the right to dower creates, and which had been found so inconvenient in England as to call for legislative interference. It is not our intention here to enter into any lengthened inquiry as to the origin and history of dower, as it would lead us away from our main object, and would serve no other purpose than to develop practices which, however curious, have now no longer any influence on society; it will suffice for us to state, that dower was fixed as early as the reign of Henry I., and entitled the wife for life to a third of all lands or tenements in which her husband was seized of an estate of inheritance during coverture, and could not be barred, until the introduction of fines and recoveries and conveyances under the statute of uses opened a door for the removal of the restriction, which those desirous of facilities in the alienation of real property, were not slow to enter. In Upper Canada, at a very early period, by 37 Geo. III. ch. 7, married women were enabled to release their dower by deed, executed either jointly with their husbands or alone: provided a certificate of their free and voluntary consent to its release were indorsed on the deed by some one of the judges of the Court of Queen's Bench, or by the chairman of the Quarter Sessions; and subsequently, by 48 Geo. III. ch. 7, 50 Geo. III. ch. 10, 3 Will. IV. ch. 9, various provisions were made for more easily obtaining this certificate, until finally, by 2 Vic. ch. 7, the necessity for it was altogether removed, and the execution by the wife, jointly with her husband, of any deed professing to release her dower, was made a complete and effectual bar to any future claim for it. But while these facilities of barring dower have been gradually increased by the legislature, no step whatever has been taken to produce any change in the law of dower itself, except the one already referred to, which has made dower attach in some cases, where it could not be

claimed before. In the early settlement of this province, questions relating to Dower were as little likely to be agitated, as they were in England before the reign of Henry I., because land was so seldom the subject of sale, and when sold, was of such little value, that the right of dower in it was hardly ever considered a difficulty in the way of its purchase or exchange; but as landed property has become more the subject of barter, the restriction on its alienation arising from dower claims, has been more sensibly felt, and the necessity for the law being placed on a better footing is almost everywhere acknowledged. In England, before the change that was made by 3 & 4 Vic. ch. 105, there were so many ways of evading dower, that it was seldom or never looked upon as a provision in cases of marriage; and although the same means by the creation of trust estate, dower uses, outstanding terms and jointures, might be used here, yet the expense attendant upon the various and complicated forms of deeds that would be required, would be too great in proportion to the value of the land to be conveyed, ever to make it likely that they would come into general use; and were property to become as suddenly valuable as it now is in England, it would no doubt be found expedient to adopt some such measure as has been adopted in the Imperial Parliament, to remove every restriction that possibly could be removed, upon its alienation, without resorting to the cumbrous machinery which has been swept away in the mother country. Dower, then, in this part of the Province of Canada, stands as it was originally constituted, except that it now attaches in cases of equitable interests, and that there is power given to the wife to release it, and we cannot but consider that its continuance in its present shape is both impolitic and unjust. The wife has a claim upon any lands that her husband may be seized of in fee during coverture, even though his right to them continued only for a moment; and though equity refused to follow the law in this construction, yet equitable interests are now placed upon the same footing, and both legal and equitable interests in estates of inheritance are subject to dower. This dower is intended, or is supposed to be, a provision devised for the support of the wife; but why should it not

depend upon the amount or value of the husband's property at some given time, instead of being determined by the quantity of the real property of which he may chance at any time to be seized in fee? or why should it not as well be made dependent upon the value of the personal property of which he may be possessed during coverture, as of the land which may happen to pass through his hands? But the law works injustice in its present state. The wife is entitled to a third of the husband's lands for her life, not of the lands only of which he may die seized, but of all lands in which he had an estate of inheritance during coverture, some of which he may have parted with twenty or thirty years before his death, when they were of such little value that the parties never thought of barring the wife's dower (a process at that time both tedious and vexatious), or perhaps it was not known that the vendor was married, and therefore no precaution against the claim was taken; but years have since passed away, and the land which was a wilderness has become the site of a town, or valuable in some other respect a thousand fold beyond its worth when it was first conveyed away; it is no longer the property of one individual, but has a hundred owners, each of whom has expended labour and money upon his portion to increase its value; and yet the wife may come in upon them all and claim her dower, not according to the value of the land when it was sold, or even at the time of her husband's death, but according to its value when she makes her claim, and has her dower assigned. This is a consideration of great importance; and as there have been conflicting decisions and opinions upon the exact nature of the assignment of dower that should be made in such a case, we shall take from the judgment of the court in *Doe dem. Riddle v. Gwinnell* (a) the various authorities that are there collected upon the point. The principal authority is Perkins, sec. 328, who lays it down that, if "the feoffee builds upon the land a castle or mansion-house, or other building, or otherwise improves it, so that it is worth more by the year than when it was in the possession of the husband, the wife shall not

(a) 1 Q. B. 689.

have her dower but according to the value it was of, in the time of her husband. And yet, if a disseisor build upon land which he hath by disseisin, and the disseisee enters, he shall have the building, &c. And so, &c., the cause of difference is apparent." The very next section, however, lays down that, if the feoffee "takes down the building, and the feoffer dies, his wife shall have dower according to the value of the land as it was at the time of the *death of her husband*, and hath not any remedy for the taking away of the building before the death of her husband, although the building was upon the same land and in the possession of her husband during the coverture; for a wife hath not right to have dower before the death of her husband: *tamen quære of this case.*" The two sections are, certainly, not very consistent. The wife's right to dower is doubtless and consummate until the husband's death; and, if that be a good reason why she must submit to the intermediate deterioration of the property, it is also a good reason why she should have advantage of the intermediate improvement of it. If the alienee be considered as in the place of the husband in regard to the land, and to have the same rights that he had, there cannot be a doubt but that the time when the value is to be ascertained must be the death of the husband. Mr. Park (*a*) refers to the Book of Assizes (14 Ass. 12) as a judgment for the widow *salvis ædificiis*; and says, "It is added with some inconsistency, and *no damages*, because the land was amended by building upon it." On examination of the original authorities, it will appear that here some confusion has taken place, and two cases have been reported as one. For the former of them is not in the Book of Assizes, but in Fitzh. Gr. Abr. Dower, pl. 192; but the part of the sentence stated by Mr. Park respecting damages, is in 14 Ass. 12, and is the case of a prior who recovered by default in an assize of novel disseisin. Plowden's 46th quære is in these terms: "A woman is entitled to have dower of a marsh; the heir by his industry makes it good meadow, she recovers it, and shall be endowed of the third part as it now is, because her title is to the *quan-*

(a) On Dower, page 256.

tity of the land, not the value : but, if the heir improves the land by building, or the like collateral improvement, it shall be otherwise. Quære, If the heir suffers the houses upon the land to decay, shall the wife be endowed of the land according to its value when it was in the possession of her husband, or shall she have the third part as it now is, and be allowed in damages for the impairing? And it seems that damages shall not be recovered in assize for the improvement of such marsh."

All these authorities, we think, admit of a general answer, from considering the nature of dower, and the remedy provided for it by the law of England. The right unquestionably attaches on all the lands of which the husband was seized during the coverture, and as certainly attaches at the period of his death. If indeed the assignment of dower be postponed, the value must be taken at the period of assignment; and as the sheriff, in case of any dispute, is the appointed judge for dividing the lands by metes and bounds, it is difficult to see how that duty can be performed at any other time—Plowden's quære, and his own opinion upon it, are in favour of the widow, but he introduces it by a reason which would apply to her prejudice, when buildings have been erected, because that improvement by building is collateral to the land. But why collateral? It occupies and obliterates the land, making an assignment of it impossible, and destroying the very means of ascertaining its independent value. The effect of planting with timber, or sowing with corn, or indeed of improving by any expensive process, is much the same, except perhaps for this last circumstance; but we cannot see any reason for calling them less collateral than building. We are therefore led to conclude, that dower attaches on the husband's real property at the period of his death, according to its then actual value, without regard to the hands which brought it into the condition in which it is found; the law apparently presuming that it will continue the same up to the assignment. The judgment of the court, therefore, in *Doe dem. Riddell v. Gwinnell*, declares that when lands at the death of the husband are in the possession of several persons, either by the husband's own act, or the act of his alienee, dower must be assigned as to one-third of the land in

each person's possession, and the conflicting decisions on the point, must now be considered as set at rest. We have in a former number of the *Upper Canada Jurist*, expressed our desire to see the law in this part of the province of Canada, assimilated as nearly as circumstances will allow, to the law in England, and regretted that many beneficial changes and alterations that had been made there, had not been adopted by us; but with respect to the law of dower, we should wish to go further in reform than they have gone in England; we should desire to see a law passed in our legislature, similar to the Imperial law, but having a retrospective, and not merely a prospective operation, and then we would hope no longer to hear complaints, such as have been uttered by many during the last few years, that dower had been claimed, and would be enforced on property, which had been purchased years before, in a wild and uncultivated state, and been paid for then by a far less sum of money than would, when the dower was demanded, pay the rental for one year, of the property set apart to meet the dower claim. It is true that by the various acts of the provincial Legislature, before referred to, much of the difficulty that was formerly felt in procuring the release of the wife's dower, has been removed; but the mere fact of this removal shews, that the restraint upon alienation produced by claims for dower, has been so sensibly felt that the door has been opened wider and wider, until only one step more is required to be taken, and the necessity of the wife's being a party to a deed, for the purpose of releasing her dower, altogether done away. It is now no longer necessary that the wife should be examined apart from her husband touching her consent to have her dower barred; no certificate of a judge of the Queen's Bench, or chairman of the Quarter Sessions, or justice of the peace, is now necessary to make valid a wife's release of her dower; if she joins with her husband in a deed, professing to release her claim, her right is taken away effectually and forever. If then those precautions, which were intended as safeguards for the wife, have been partially removed, why not remove them altogether; the wife will seldom or never refuse to join in her husband's conveyance, but the refusal should not be left in her power, when the very

fact that such a power exists serves as a clog upon alienation, and may frequently render it necessary, when dower does not appear to have been barred, to prove that the vendor in the deed excepted to was not married, or that his wife has died since its execution. We would therefore propose, that such parts of the English act, 3 & 4 Wm. 4, ch. 105, as have the effect of releasing land as disposed of by the husband, either during his life time, or by his will, from his wife's claim to dower, should be adopted by us, and that the clause in 4 Wm. 4, ch. 1, which makes dower attach upon equitable estates, should be repealed, and the whole subject, both at law and equity, be placed on a similar footing, giving also the preposed alterations a retrospective operation, so as to embrace all claims for dower hereafter, whether the marriage should have taken place before or after the passing of the act. We subjoin the form of an act, taken from the English statute, with the alterations which we have proposed to make:—

1. That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: that is to say, the word “land,” shall extend to messuages and all other hereditaments, whether corporeal or incorporeal,) except such as are not liable to dower), and to any share thereof; and every word importing the singular number only, shall be extended and applied to several persons or things, as well as one person or thing.

2. That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

3. That a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

4. That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

5. That the right of a widow to dower shall be subject to any

conditions, restrictions or directions, which shall be declared by the will of her husband duly executed as aforesaid.

6. That where a husband shall devise any land, out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

7. That no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

8. Provided always, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband, not to bar the right of his widow to dower out of his lands or any of them.

9. That nothing in this act contained shall interfere with any rule of equity, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

10. That the thirteenth clause of statute 4 Will. IV. ch. 1, be, and the same is hereby repealed.

11. That this act shall extend to the dower of any widow whose husband shall die after the passing of this act, and shall make any will, deed, contract or engagement, executed, made or entered into before the passing of this act, by any husband who shall die after the passing of this act, as valid and effectual, to bar or affect the right of his widow to dower, as if such will, deed, contract or engagement had been executed, made or entered into, after this act was passed.

POINTS IN PLEADING AND PRACTICE.

NO. III.—ADMISSIONS IN PARTICULARS OF DEMAND.

By the sixteenth of the New Rules, Easter Term, 5 Victoria, “In any case in which the plaintiff (in order to avoid the expense of a plea of payment), shall have given credit in the particulars of his demand, for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money; but this rule is not to apply to cases where the plaintiff, after stating the amount of his demand states that he seeks to recover a certain balance,

without giving credit for any particular sum or sums." This rule, similar to one which was passed in England in consequence of the conflict of authority between the Courts of Common Pleas and Exchequer, in the cases of *Ernest v. Brown* (a) *Coates v. Stephens*, (b) and *Kenyon v. Wakly*, (c) does not seem at first sight altogether to have attained its object. Where the plaintiff has in his particulars admitted the payment of certain sums of money by the defendant, expressly as it were to give him the benefit of the rule and obviate the necessity of the plea of payment, and the defendant has received the particulars in that spirit, and not pleaded payment of any of the sums admitted, there can be no doubt of the construction of the rule. Both parties are benefited by it; the defendant by the deduction from the plaintiff's demand without being required to offer evidence in proof of payment, and the plaintiff by being saved the expense, which the plea of payment if properly proved is sure to entail upon him. But a difficulty may seem to arise, if the defendant, either from ignorance or design, should plead payment of the monies admitted in the plaintiff's particulars. Who will then be entitled to the verdict on the plea of payment? The defendant might contend that it is *optional* with him to plead payment or not, as he thinks proper, and that as his plea is proved by the plaintiff's own particulars of demand, he must be entitled to the verdict on that issue; on the other hand, the plaintiff may urge that though the language of the rule "that it shall not be *necessary* for the defendant to plead the payment of such sum or sums of money," would, considered apart from the context, imply that the defendant was at liberty to exercise a discretion on the subject; yet that the object and spirit of the rule require a different construction, and that the words should be read "the defendant shall *not be allowed*," instead of "it shall not be *necessary*;" as thereby the benefit intended to the parties by its promulgation would be secured, the defendant having his payments admitted, and the plaintiff avoiding the expense of the plea; which, after such admission, would no longer be requisite, as its use would

(a) 3 Bing. N. C. 674. (b) 2 C. M. & R. 118. (c) 2 M. & W. 764.

serve only to embarrass, instead of being conducive to the ends of justice. That this construction is now put upon this rule, is shewn by the remarks of Patterson, J., in *Morris v. Jones et al.*, (a) "Applications are often made at chambers to strike out a plea of payment when the particulars of demand admit a specific sum to have been paid; and such a plea is not allowed in that case, unless the party undertakes to prove a specific payment not covered by the admission." This is in accordance with the principle laid down in *Freeman v. Crafts*, (b) which was decided before the new rules in England. In that case, the declaration was in debt, and contained three counts, 10*l.* for goods sold and delivered, 10*l.* for work, labour and materials, and 10*l.* on an account stated. The defendant pleaded payment to the whole declaration; and upon the trial, proved payments to the plaintiff of sums exceeding the amount claimed in the declaration, and the jury found that 92*l.* had been paid by the defendant to the plaintiff, but that the plaintiff had done work for the defendant to the amount of 107*l.*; a verdict was thereupon taken for the plaintiff for the balance of 15*l.*, and upon a motion for a rule to enter a verdict for the defendant, on the ground that the plaintiff was not entitled to recover without a new assignment, the Court of Exchequer refused to grant the rule, Lord Abinger, C. B., observing, "The plea means that the defendant has paid the sum that the plaintiff goes for, or it means nothing. To make it a good defence, it must be interpreted to apply to a payment of the money the plaintiff seeks to recover; it is no answer, unless it means that the plaintiff can prove no sum that the defendant has not paid." Alderson, B., said, "It is like the plea of license in trespass, where the defendant must prove a license for every trespass the plaintiff can prove. So, in a plea of payment, you undertake to prove that whatever demand the plaintiff can establish, you have paid him. No new assignment was therefore necessary." And in *Eastwick v. Harman*, (c) Alderson, B., also says, "Where the limit of the plaintiff's claim is defined by the bill of particulars, and he is

(a) 1 Q. B. 397.

(b) 4 M. & W. 4.

(c) 6 M. & W. 13.

going only for a balance, after crediting payments, whenever made, the plea of payment is to be taken with reference to that balance." And in *Lamb et al v. Micklethwait*, (a) which was an action of debt for 934*l.* 9*s.* 6*d.* for goods sold and delivered, 12*l.* 8*s.* 6*d.* for work and materials, 2*l.* 2*s.* for money paid, and 949*l.* 10*s.* on an account stated, the same principle is upheld. There the particulars of demand annexed to the declaration stated that the action was brought for plated goods sold and delivered, and for work done and materials provided for the defendant between the 1st January and 30th March, 1839, and money paid for the use of the defendant during the same period, (the full particulars of which could not be comprised within four folios), after giving credit to the defendant for 920*l.* 8*s.* 11*d.* paid at various times. Pleas, *nunquam indebitatus*, and payment of all monies in the declaration, on which issue was joined. The plaintiffs proved their claim to the amount of 949*l.* 10*s.*, and admitted that a silver tea urn, the price of which was 84*l.* 18*s.*, and formed part of the 949*l.* 10*s.*, was returned by the defendant, and taken back; but they contended this was included in the 920*l.* 8*s.* 11*d.*, for which credit was given in the particulars of demand. The defendant's counsel contended that the plaintiffs were precluded from putting their case in this way by the language of the particulars, as the receiving back of the tea urn could not be looked upon as *money paid*, and therefore that as the admitted payments overbalanced the plaintiff's demand, the defendant was entitled to a verdict. But the court would not so allow it, considering that the defendant must have understood that the price of the returned tea urn was included in the sum of 920*l.* 8*s.* 11*s.* credited as money paid. And where the plaintiff, in his particulars, gives credits for *payments*, he can only recover for the amount by which the claims proved by his witnesses exceed such payments; but if the credits given by him also include items which are purely matters of *set-off*, the defendant cannot take advantage of those items to shew a balance in his favour against the plaintiff, who has

failed in the proof of some part of his particulars, which has reduced his claim below the sum admitted in the defendant's favour, the admission of set-off not being within the rule, and the defendant being obliged either to bring proof of those items, or to allow the whole account, (including the parts of the plaintiff's demand not proved), to be submitted to the jury, if he could go into the evidence at all without a plea of set-off on the record. *Rowland v. Blakesly et al.*(a) But the admission of a payment in the plaintiff's particulars, while it removes the necessity of a plea of payment, cannot be taken as an admission as against the defendant, with respect to any of the items of the entire account.(b) And where a particular item is debited to the defendant on one side, and credited to him on the other; the particulars must be taken as if they had not mentioned it at all. *Green v. Smithies.*(c) But where a plaintiff in his particulars of demand admits a payment generally, as thus: *Cr. by bills 1500l.,*" this to be taken as a payment admitted to have been made to the plaintiff *by the defendant*. *Smithurst v. Taylor et al.*(d) And in this case, Lord Abinger, in giving judgment, says, "I take it to be clear, that if a plaintiff in his particulars, admits the payment of a certain sum, he may explain it by shewing that it was applicable to an item which he could not otherwise recover. But it is equally clear, that the plaintiff, by such an admission in his particulars, makes it unnecessary for the defendant to prove any payment which is so admitted: and that the plaintiff in order to recover a verdict, must prove something beyond the amount admitted; and I do not see that the new rule makes any difference, except that it also renders a plea of payment unnecessary in such a case. The plaintiff admits payment of a certain sum, and goes for the residue of his demand; then he must shew some residue, some demand beyond the sum admitted. That is the whole effect of the rule, and that was satisfied in the present case."

(a) 1 Q. B. 403.

(b) 12 Law. J. N. S. 32

(c) 1 Q. B. 796.

(d) 12 M. & W. 545.

IN CHANCERY.

TUESDAY, 19TH NOVEMBER, 1844.

CULLEN V. PRICE ET AL.

Demurrer. Bill sets forth an indenture purporting to be a lease with a covenant for leave to lessee to become purchaser of the demised premises, upon certain stipulated terms, but alleges that *before and at the time* of the execution of the said indenture, it was expressed and understood by the parties thereto, that it should, and that in fact it did, operate and take effect as an absolute conveyance and mortgage of the premises therein mentioned, and that the amount of rent reserved was determined by the interest of the purchase money £1,000, and that the rent was in fact paid as interest thereon, and the bill prayed (amongst other things), an account of what was due for principal and interest, in respect of the purchase money, and a specific performance of the covenant for purchase; defendant demurred to the bill, and the demurrer was allowed.

The bill stated that by indenture, bearing date 25th June, 1834, and made between defendant Price of the one part, and defendant Armstrong of the other, Price for the considerations therein mentioned, demised unto Armstrong, his heirs, executors, administrators, and assigns, all that parcel of land in the Gore and Township of Toronto, in the Home District, (describing the premises), containing about 210 acres, and all and singular the buildings thereon erected, with the appurtenances, for the term of ten years, to commence from the 1st September then next ensuing, at the yearly rent of £60, over and above all taxes. In which said indenture are contained covenants on the part of both Price and Armstrong, to be by them their heirs executors and administrators, respectively performed; and amongst others, is a covenant in the words and figures or effect following, that is to say, ‘ And the said Joseph Price, for himself, his heirs, executors, and administrators, or assigns, doth hereby covenant, grant, and agree to and with the said Alexander Armstrong, his executors, administrators and assigns, that he the said Joseph Price, his heirs, &c., shall and will well and sufficiently grant, bargain, sell assign, and convey, in fee simple, the whole of the said lands and premises, hereinbefore demised unto the said Alexander Armstrong, his heirs, executors, administrators, or assigns, free from all incumbrances whatsoever, provided the said Alexander Armstrong, his heirs, executors, administrators, or assigns, shall, on or before the expiration of the term here-

by granted, pay or cause to be paid unto the said Joseph Price, his heirs, &c., the just and full sum of £1,000 by payments of not less than £250 each, and also in case the said Alexander Armstrong, his executors, administrators, or assigns, shall have paid any part of the said sum of £1,000, and shall be unable to pay the remainder, then he, the said Joseph Price, for himself, his heirs, &c., further covenants, grants and agrees, to and with the said Alexander Armstrong, his executors and administrators, that he, the said Joseph Price, his heirs, &c; will pay back to the said Alexander Armstrong, his executors, &c., all such sums so paid as aforesaid, at the rate of £200 per year, until the whole sum is paid; and the said Alexander Armstrong, for himself, his executors, &c; hereby further covenants and agrees, to and with the said Joseph Price, his heirs, &c., that he shall and will erect, or cause to be erected, on the said demised premises, a good substantial frame house, of two stories in height, 36 feet by 28 feet, and leave the same in good repair on the said premises at the expiration of the term hereby granted." The bill went on to state, that the annual rent of 60*l.*, payable in respect of the demised premises, was before the execution of the said indenture of lease ascertained and determined between the parties, because it was the amount of the legal interest for the said sum of 1,000*l.*, the consideration of, and in the said indenture mentioned, at the rate of six per centum per annum, and that the interest of the said sum of 1,000*l.*, the amount of the purchase money, was made payable in the form of rent, in order to enable the said Price effectually and with less expense to enforce the punctual payment of and recover the said interest. The bill further stated, *that before and at the time of the execution* of the said indenture, it was expressed and well understood by the parties thereto that the said indenture should, and that it did afterwards operate and take effect as an absolute assignment and conveyance of the lands and premises therein mentioned, to the said Armstrong, and also as a mortgage for securing the payment of the said sum of 1,000*l.*, and that the rent of 60*l.*, therein reserved, was to be paid by Armstrong and his assigns, as and for interest on 1,000*l.*, the consideration of the said indenture, The Bill

further stated, that Armstrong, immediately after the execution of the said indenture, entered into possession of the premises, and continued in such possession (until the time thereafter mentioned), by virtue of the said indenture, and observed and performed all covenants and agreements on his part, and paid the said annual sum of 60*l*, at the times appointed therefor by the said indenture; that afterwards plaintiff agreed to purchase the said lands and premises from Armstrong, and all his right, title and interest therein, for the sum of 250*l*., and accordingly paid him that sum; and in consideration thereof, Armstrong, by indenture dated 19th July, 1837, conveyed the premises, and all his interest therein, to plaintiff, his heirs and assigns. That plaintiff thereupon entered into possession and occupation of the premises, and still is in possession and occupation of them, except so much as his held and occupied by the defendant Weir. That plaintiff hath at all times duly performed and observed all covenants and agreements contained in the first mentioned indenture, and to be observed and performed by Armstrong and his assigns; and that he hath duly paid at the times limited therefor the said annual sum of £60, payable in respect of the said premises, and of the said sum of £1,000, and that he hath expended large sums of money, exceeding £500, in permanent improvements on the premises, and erected a good and substantial frame house, of two stories in height, with suitable offices and barns. That in 1837 plaintiff agreed to sell a portion of the said premises to the defendant Weir, for the sum of £150 and in consideration of that sum entered into a bond to Weir, in a penalty of £300, to give him a good title, in fee simple, to the portion of the premises so sold as aforesaid to him. That Weir immediately entered into possession of the portion of the premises which he so agreed to purchase, has erected thereon four dwelling houses with suitable offices, and expended at least the sum of £300; and has frequently requested the plaintiff to convey to him according to agreement, and threatens to sue plaintiff on bond. That plaintiff is unable to make a good title to defendant Weir, in consequence of the refusal of the defendant Price to convey o

plaintiff. The bill prayed that an account might be taken of what (if anything) is due in respect to the sum of £1,000, and of all sums of money received by defendant Price, or by any person by his order, or on account of the said sum of £1,000—the plaintiff on his part offering to pay what shall appear to remain due for principle or interest, in respect thereof. and “that the defendant Price may specifically perform the said covenant contained in the last mentioned indenture, and be decreed to convey to plaintiff the said land and premises, plaintiff submitting and offering specifically to perform all the covenants and agreements in the said indenture contained, on the part of the said Armstrong, his heirs and assigns, to be performed.” The remainder of the prayer is irrelevant to the question which arose. To this bill the defendant Price put in a general demurrer for want of equity.

Harrison and Esten in support of demurrer.

Hagarty and Ramsay against.

Harrison.—Plaintiff contends that the instrument set out in the bill operates not only as an absolute sale, but as a mortgage; but it cannot bear such a construction. It is a lease. If a sale, then what is meant by the stipulation as to the mode of payment of the £1000? That the sum is to be paid by instalments of £150 each; and if it shall not have been paid in due time, then Price repays to Armstrong what the latter shall in fact have paid: the instrument also contemplates the event of a cession of Armstrong's possession. It is therefore a lease, containing a covenant for leave to purchase at a stipulated price; and, if so, time is of the essence of the contract. Even in cases of admitted purchase, time is more readily allowed now than formerly to be made the essence of the contract. There is a distinction between a forfeiture and a privilege, with respect to time; a mortgage is an example of the former, the present case is an example of the latter; for, even if it be a purchase, plaintiff is only to have a certain time to avail himself of this privilege.—*Davis v. Thomas*, *Russell v. Mylne*, 506; *Hesswell v. Knight*, 1 Y; and Col. 415; 1 Story Eq. Jur. 86. There is no allegation in the bill that any part of the purchase money of £1000 has been paid, but only that plaintiff has ex-

pended money on the premises, which is beside the question, as he stipulated to do so. And, even if he had paid any part of the purchase money during the term, he has by the instrument provided a remedy, as such part payment was to be repaid him at the expiration of the term.

Hagarty (to whom *Esten* gave way).—The transaction stated by the bill is a mode of effecting a sale common in this country: the arrangement was for convenience to give the vendor, as landlord, a greater control and security. The statements in the bill must be assumed to be true. If it be true that defendant agreed to convey, then he has acted harshly and in bad faith, which this court will not allow. The court will look to the real nature of the transaction; and if defendant intended to avoid the true agreement, he should not have demurred, but pleaded the Statute of Frauds. The bill expressly states that the arrangement was for the purpose of clothing the vendor with powers, which he would not have as a vendor merely, time, then, cannot be of the essence of the contract. It is hardly possible to make it such in ordinary cases of sale. Sir Edward Sugden, in his *Treatise on Vendors and Purchasers*, thought it necessary to suggest a clause in the strongest terms, in order to render time essential. Suppose defendant had covenanted to renew the lease, would he not have been compelled to renew? Besides, evidence may control a contract, and acts may waive a forfeiture.

Hagarty strenuously argued that the plaintiff must succeed from the nature of the case, as it must now be assumed to be on demurrer. The cases cited by him were *Wells v. Straddling*, 3 Ves. 378; *Goodman v. Grierson*, 2 Ball & Beat, 278; *Woodfall Landlord and Tenant*, 877; *Bartram v. Hudson*, 3 Mad.; *Seton v. Sleigh*, 7 Ves. 277.

Esten contra.—The instrument purports to be a lease, with a covenant for purchase. The bill alleges that, *at the time and before this lease*, it was agreed it should operate as a sale and mortgage. Now, a demurrer only admits facts which may be properly proved; that is, of which evidence is admissible. The alleged parol agreements here could not be proved; for, though sometimes a subsequent parol variation is admis-

sible, a cotemporaneous one is not, because, when parties execute a written agreement, it is presumed the writing introduces all they meant. It is true, parol evidence is sometimes admitted to reduce an absolute deed to a mortgage ; but here the object goes beyond that—it is to reduce a lease, with a covenant for purchase, to a sale and mortgage. The use of parol evidence for varying written instruments, is not to be extended (see Sugden's note on parol variations). But, though courts of equity, having *generally* the same rules of evidence as courts of law, sometimes apply those rules differently, yet it is in favor of a defence, or because the parol agreement has been partly acted upon. Here the parol evidence (by which alone the facts of the bill can be proved) is in favor of the *plaintiff to enforce*, not the original, but a new agreement ; nor is there part performance, because the possession is under the *lease*, and not under the *agreement for purchase* ; because the latter would assume the agreement for purchase, under which possession is alleged to have been taken, to have been *cotemporaneous* with the written agreement. What is the plaintiff's case, on the construction of the instrument itself ? It would do violence to its language to consider it anything else than what it purports to be. How, then, can the court reject the language of this instrument, on a mere vague alleged custom of effecting purchases in this manner. The plaintiff's right, then, was a privilege to purchase. It must be intended the money was not paid, and if plaintiff did not avail himself of his privilege at the time, it is now too late. The only important allegation in the bill on this head is, the application to defendant to convey, and offer to pay what shall be found due ; yet (supposing those allegations not merely words of form) the applications are not alleged to have been made before the expiration of the ten years. There are distinctions on the head of time. Generally, time is not of the essence of a contract, but that is where there is vendor and purchaser, where *either party* may come to enforce the contract for specific performance ; but here is no mutuality, but a mere privilege to one, not binding on the other, and in such case the party is kept strictly to the time limited by the agreement. The case of *Fraser v. Wells*, in this court, is in point. The

question there was, whether there was a sale with a right of re-purchase, or a mortgage; time was held to be of the essence. In the present case, it is a privilege dependent on a condition precedent; that is, a privilege of which the plaintiff has never been in possession or availed himself (*a*). The distinction is where an interest is to divested, or a forfeiture incurred, and a privilege to be gained. In *Davis v. Thomas*, the default was not in applying *after* the five years, but *before*, and where the default was in payment of rent; yet relief was refused.

Ramsay, counsel for plaintiff, denies that he endeavours to vary by parol an agreement in writing. The deed contains a covenant respecting improvement. The object of that covenant was, to give the vendor greater security, and that object can be proved. There is a class of cases which establish, that such evidence is admissible to explain the purport for which a covenant is inserted in a deed, or the relation between covenants. The case of *Thomas & Davis* is distinguishable from the present. In that case there was a mere privilege, there was no act to be performed, but here certain acts were to be done, with a view of enhancing the value of the security; that is not a mere privilege; besides, in *Thomas & Davis*, there was an express stipulation, that time should be of the essence. In Ireland, where it is customary to make leases for lives, renewable for ever, and the landlord is entitled to a fine on each renewal, time is not held to be of the essence of the contract. Time is of the essence of a contract either where the omission to do an act subjects the party to an action or some loss, or where the thing to be enjoyed depends on its immediate use at the time agreed upon. Besides, there is a part performance. It is alleged that the payments made were for interest on the purchase money, and that the improvements were made for additional security (*b*).

(*a*) *Eusworth v. Griffith*, 5 Bro. P. C. 184; *King v. Bromley*, 2 Eq. Ca. Abr. Pl. 8; S. C. 5 Bac. Abr. 10; 2 Eq. Ca. Ab. 595; *Cotterell v. Purchase*, Cases Temp. Talbot, 67; *Finsbury v. Echlin*, 2 Bro. P. C. 265; Mr. Jarman's Ed. of Bythewood, 5 vol. 513, and note.

(*b*) *Lennon v. Napper*, 2 Sch. & Lef. 682; *Lord Ormond v. Anderson*, 2 B. & Beat. 334; *Clarke v. Wright*, 1 Atk. 12; 1 Y. & Col. 401; 1 Russ. 376; 6 Mad. 25, 19 Ves. 320; *Newland on Contracts*, 238.

Harrison, in reply.—Parol evidence cannot be admitted to vary or alter a written agreement, but is admissible only to raise an equity on some collateral circumstances, but here the object is to vary and contradict it (*a*).

Friday 22nd Nov. 1844.

V. C.—The court would take a most extraordinary course in assuming that the instrument which purports to be a lease was at its inception something difficult.

Demurrer allowed.

CASES IN THE ENGLISH COURTS.

HUNT *v.* HOOPER and Another.

In an action against the sheriff for not levying, and for a false return of nulla bona, it appeared that a writ of *fi. fa.* was issued by the plaintiff against the goods of W., and was delivered to the sheriff on the 7th of June, with a direction to issue the warrant immediately, and the seizure took place the day after. Previously (on the 1st of June), B. had delivered a writ of *fi. fa.* against W. to the sheriff, with directions to execute it, at the same time suggesting that the next morning would be the best time for the purpose, but he did not order the sheriff to restrain the execution until that time. Subsequently (W. having offered him £50 to stay the execution), B. verbally desired the sheriff, and on the 2nd of June gave him written notice, not to execute the writ until further orders. The £50 not being paid, B. requested the sheriff to proceed, and the bailiff accordingly entered, but found the plaintiff's bailiff in possession. The sheriff then sold the goods, paid the money to B., and returned nulla bona to the plaintiff's writ. The jury found that B.'s writ was in the first instance intended to be executed:—Held, that the notice by B. not to execute the writ until further orders was equivalent to a withdrawal of his writ, which could not be considered as in the hands of the sheriff *to be executed*, within the meaning of 29 Car. 2 c. 3, s. 16, until the order to proceed; and therefore that the plaintiff was entitled to a verdict for the amount levied.

Case against the sheriff of Middlesex. The first count was for a false return of nulla bona to a writ of *fi. fa.*; and the second was for not levying under the writ, when there were goods upon which the defendants could and ought to have levied.

The defendants pleaded, first, not guilty; secondly, to the first count, that they did not levy the monies indorsed on the writ in that count mentioned, or any part thereof; thirdly, to the second count, that there were not any goods or chattels of the said William Ward (the execution defendant), out of which they (the defendants) as such sheriff as aforesaid,

(*a*) *Davis v. Symonds*, 2 Cox. 402; *Ogilve v. Foljambe*, 3 Mer. 53; *Webb v. Plumer*, 2 Barn. and Ald. 746.

could or might have levied the monies indorsed on the said writ in the second count mentioned, or any part thereof, modo et forma.

The replication took issue on the above pleas.

At the trial before *Rolfe*, B., at the Middlesex sittings in last term, it appeared that the plaintiff, having obtained a judgment against a person of the name of Ward, issued thereon a writ of *fi. fa.*, which was delivered to the defendants, as sheriff of Middlesex, on the 7th of June, 1843, with directions to issue a warrant immediately. On the following day a seizure took place under that writ. Before the plaintiff's writ had issued, namely, on the 1st of June, 1843, one Bird had delivered to the defendants a writ of *fi. fa.* against the goods of Ward, indorsed to levy £518 19s. 8d., besides, &c., with directions to execute it, and at the same time suggested that the following morning would be the best time for that purpose; but no direction was given not to execute it until that time. In the meantime, however, Ward requested Bird to stay the execution, and promised him £50 if he would do so. Bird, in consequence, verbally desired the defendants to suspend the execution, and on the 2nd of June, 1843, gave them a written notice not to execute the writ until further orders. On the 9th of June, the £50 not having been paid by Ward, Bird required the defendants to proceed with the execution, and the bailiff accordingly entered, but found another bailiff in possession under the plaintiff's writ. The defendants, however, proceeded to sell under Bird's execution, and paid over the sum of £27 5s. 11d., the amount realised, to him, and returned *nulla bona* to the plaintiff's writ. The learned judge having left the question to the jury, they found that Bird's writ was, in the first instance, intended to be executed, and not suspended until the following morning. A verdict was then found for the defendants, leave being reserved for the plaintiff to move to enter a verdict for him for the sum levied, if the court should be of opinion that, under the circumstances, he was entitled to recover. *Erle* having obtained a rule accordingly, on the ground that Bird's writ was not entitled to priority, under the circum-

stances of the present ease, citing *Kempland v. Macaulay* (a) and *Pringle v. Isaac* (b).

Butt (*Jervis* with him) shewed cause (Feb. 9).—As between the sheriff and execution creditor, the general rule is, that the writ first delivered to the sheriff is entitled to priority, and binds the goods of the party from its delivery. In *Smallcomb v. Cross* (c) it was, after argument, resolved by all the judges, “that if two writs of execution are delivered to the sheriff the same day, he has not an election to execute which he pleases, but he must execute that which was first delivered.” And, although there be a levy under a second writ, the goods are bound by the first, unless there be fraud; and the sheriff is bound to apply the proceeds to satisfy the first writ. Thus, in the case of *Smallcomb v. Cross*, it was also resolved that, if the sheriff levies goods by virtue of the writ last delivered, and makes sale of them (whether the last writ was delivered upon the same day or a subsequent day), the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered; but he may have his remedy against the sheriff. The only exception to that rule is, where the first execution creditor has delivered his writ to the sheriff fraudulently, without any intention at the time of leveying, but with a view to protect the defendant’s goods from a second execution. And, accordingly, in the case above cited, it was held, that no action lay against the sheriff, “because he who delivered his first writ would not take a warrant from the sheriff to levey the goods; so that it seems he had a design only to keep the execution in his pocket to protect the defendant’s goods by fraud.” That, however, is a question for the jury, as was held in *Bradly v. Wyndham* (d). The marginal note there is, “A. first fi. fa., executed fraudulently; a second fi. fa., executed afterwards, shall stand and be preferred, and the matter was properly left to the jury.” The defendants entirely assent to that proposition, and are not interested in denying it; for, in this case, the jury have found that there was a bona fide delivery of Bird’s writ to be executed; indeed, no fraud

(a) *Penke’s N. P. C.* 95.

(c) 1 *Ld. Raym.* 251.

(b) 11 *Price*, 445.

(d) 1 *Wils.* 44.

whatever is imputed, nor was there any injury or disadvantage to the second execution creditor. In *Kempland v. Maccaulay* (a), which is relied upon by the other side, Lord *Kenyon*, C. J., was of opinion, "that though, in general, the sheriff must first levy on the writ which he first receives, yet, if the plaintiff in that writ directs it not to be executed before a distant day, and, in the meantime, another execution comes, the sheriff is not to keep the first writ hanging over the heads of other creditors, but is to levy under the last execution, as if no other had ever been delivered to him." That is perfectly good law as applied to the facts of that case, where a letter had been written by the plaintiff's attorney to the sheriff's officer, directing him not to levy under the writ till a future day, evidently for the fraudulent purpose of covering the defendant's goods; and, in the meantime, another execution came to the sheriff's hands, under which he levied. But that dictum is totally inapplicable to the facts of the present case, where the writ was bona fide delivered to the sheriff on the 1st of June for the purpose of being executed. The case of *Pringle v. Isaac* (b) was an action for a false return. There the attorney of a judgment creditor delivered to the sheriff a writ of fi. fa. accompanied by a letter, directing him not to execute it till the return, unless another execution should come in in the meantime; and afterwards he sent in an alias, with the same directions. Another execution coming in, the sheriff gave precedence to it, and returned nulla bona to the first writ. The judgment creditor having brought an action against the sheriff, it was held, that it would not lie. But the facts of that case were altogether different from the present. That was a mere colourable proceeding with a view to defeat the other creditors, and the plaintiff's writ was not bona fide delivered to the sheriff to be executed. In the present case, there was a bona fide *postponement* of execution, but that was after a delivery of the writ *to be executed*, and there is no suggestion of any fraud. The general doctrine that the first writ is entitled to priority, ought therefore, in this case, to

 (a) Peake's N. P. C. 95.

(b) 11 Price, 445.

prevail. The clear rule of law is, as laid down in *Hutchinson v. Johnson* (a), that, where two writs of *fi. fa.* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were first made under the subsequent execution. *Drew v. Lainson* (b) is an authority to the same point, though the question arose on the validity of the plea. The rule of law is there taken to be, that, though the levy is under the second writ, the sheriff is bound to satisfy the first. In this case, Bird's debt was large, and the goods sufficient to satisfy a small part only of the debt; and the sheriff was justified in returning *nulla bona*. In *Wintle v. Freeman* (c), the plaintiff having issued a *fi. fa.*, the sheriff seized goods, the proceeds of which were exhausted by payment of a year's rent to the landlord, under stat. 8 Anne, c. 14, s. 1, the expenses, and the sum due under another writ of *fi. fa.*, previously delivered to the sheriff; and it was held, that a return of *nulla bona* to the plaintiff's writ was proper, and that the sheriff, in an action against him for falsely making such return, might shew the above facts under a plea, that the original defendant had no goods whereof the sheriff could levy the damages in the declaration mentioned.

Erle and *Crompton*, in support of the rule.—This is an action for a false return of *nulla bona*, and for not levying when there were goods upon which the sheriff could and ought to have levied. At the time when the plaintiff's writ was delivered to the sheriff, and also when the levy was made, Bird's writ of execution, though in fact in the hands of the sheriff, had been countermanded. [*Rolfe*, B.—What was said was, here is the writ, but the best time to levy is to-morrow morning. The real meaning of it was, that he was not to levy later than the following morning.] It is submitted that the notice of the 2nd of June amounted to a positive suspension of the execution until further orders, and the simple question is, whether it must not, under the circumstances, be considered as withdrawn, and therefore not

(a) 1 T. R. 729.

(b) 11 Ad. & Ell. 529; 3 P. & D. 245.

(c) 11 Ad. & Ell. 539; 1 G. & D. 93.

in the sheriff's hands *to be executed*, within the meaning of the Statute of Frauds, 29 Car. 2, c. 3, s. 16, which enacts, "that no writ of execution shall bind the property of the goods, but from the time that such writ shall be delivered to the sheriff *to be executed*." The circumstances under which this writ was placed in the sheriff's hands prevented it from having that effect. It is just the same as if it had been actually withdrawn. In *Barker v. St. Quintin* (a), it was held that, after a direction of the plaintiff not to execute a writ of *ca. sa.*, the sheriff, if he does so, becomes a trespasser. So, in this case the sheriff was in the situation of having a writ in his hands not to be executed; and if he had executed it during the continuance of the countermand, he would have been a trespasser. During the interval between the 1st of June and the 9th, there was no duty in the sheriff to levy under Bird's execution; and if he had levied, the execution debtor would have had a right of action against the sheriff, as having no direction to execute the writ. Here the fact was, that the plaintiff stopped the execution upon a promise to pay £50 by a given time. In every one of the cases of this kind, there has been nothing in the nature of fraud, but merely the giving of some favour, by which the execution was delayed. Lord *Kenyon*, in *Kempland v. Macaulay* (b), did not put the case on the ground of fraud at all, but on the simple ground "that, if the plaintiff in the first execution directs it not to be executed before a distant day, and in the meantime another execution comes, the sheriff is not to keep the first writ hanging over the heads of the other creditors, but is to levy under the last execution, as if no other had ever been delivered to him." And the cases of *Pringle v. Isaac* (c), *Payne v. Drewe* (d), and *Samuel v. Duke* (e), are also authorities shewing that the execution does not bind the goods, by reason of the delay, when there has been a suspension of the writ. A countermand of execution is tantamount to a withdrawal of the writ. This writ was not, at the time when the second execution came in, within the meaning of the Statute of Frauds, in the hands of

(a) 12 M. & W. 441. (b) Peake's N. P. C. 95. (c) 41 Price, 445.
 (d) 4 East, 523. (e) 3 M. & W. 622.

the sheriff to be executed, and he would have been a trespasser if he had executed it before he received further instruction to do so.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B.—The question in this case arose on a motion to enter a verdict on a point reserved by my brother *Rolfe*. The plaintiff brought an action against the defendants, the sheriff of Middlesex, for not levying, and for a false return of nulla bona to a writ of fi. fa. issued by the plaintiff against the goods of one Ward. The writ was delivered by the plaintiff to the defendants on the 7th of June, with directions to issue a warrant immediately; and the seizure took place the day after. Before this, namely, on the 1st of June, one Bird had delivered a writ of fi. fa. to the sheriff, with directions to execute it, and at the same time suggested that the following morning would be the best time for the purpose; but did not order the sheriff not to execute it until that time. Before that period, the defendant Ward made a request to Bird to stay the execution, and promised him 50*l.*, and Bird on that day verbally, and on the day after in writing, gave notice to the defendants not to execute his fi. fa. until further orders. On the 9th June the 50*l.* not having been paid by Ward, such further orders were given; but when the bailiff for Bird entered, the plaintiff's bailiff was in possession. The defendants, however, proceeded to sell to satisfy Bird's execution, and paid over the amount 27*l.* 5*s.* 11*d.*, to him, and returned nulla bona to the plaintiff's writ, and the plaintiff then brought this action.

The jury found that Bird's writ was, in the first instance, intended to be executed, and not suspended until the following morning. The question is, whether the defendants were justified in giving Bird a preference, and paying over the proceeds to him. There is no doubt but that the sheriff, as between him and different execution creditors, is bound to execute that writ which is first delivered to him to be executed, and is responsible to the first creditor who so delivered his writ if he does not. On the part of the defendants, it was contended, that they were justified in preferring Bird's

because Bird's writ was first delivered to them within the meaning of this rule; and that such first delivery entitled him to a preference, unless it was *fraudulent*, that is, unless it was put into the sheriff's hands, to cover the goods against a subsequent execution, without any intention to make an actual levy, in which sense Bird's execution certainly was not fraudulent. The plaintiff's counsel, on the other hand, contended that Bird's writ ought to have no preference, because, though it was first delivered to be executed, such execution was afterwards countermanded, and, whilst such countermand continued, the writ must be considered as not delivered at all *to be executed*, because the sheriff could not act upon it, and that the second order to execute could give no priority. All the authorities bearing on this question were cited on one side or the other. On full consideration of them, we are of opinion that the plaintiff's argument is well founded.

To the plaintiff's complaint, that the defendants have not executed his writ, their excuse is, that they had a prior writ in their hands to be executed when the plaintiff's writ was delivered to them, and that they did execute that writ by seizing and selling under it; the plaintiff's answer to that excuse is, that, when his writ was delivered, the defendants had received orders not to execute the former writ, and consequently had no writ to be executed, and would have been trespassers if they had attempted to do so, and therefore could not legally seize or sell under that writ; and this, we think, is a good answer to the sheriff's excuse. That the sheriff would have been a trespasser by acting under a countermanded writ, and which was therefore a writ not delivered to be executed, was settled by the recent case of *Barker v. St. Quintin*, in this court.

The authorities relied upon by the defendants in support of the position, that a writ first delivered is to have the preference, unless it be fraudulently delivered in the sense before mentioned, do not really sustain it. In *Kempland v. Macaulay (a)*, Lord *Kenyon* does not rest the case on the ground of *fraud*, but says, that if the sheriff is

(a) Peake's N. P. C. 96.

directed not to execute the first writ before a given day, and another execution in the meantime comes, he must execute that. To the same effect is *Pringle v. Isaac*, (a) which last case did not turn upon the supposed fraudulent intent to protect the goods, but on the omission of the plaintiff to direct his writ to be executed, and *Wood, B.*, said the case was within the principle of *Kempland v. Macaulay*, and the question of fraud need not be left to the jury. In *Smallcombe v. Cross* (b), which has the appearance of supporting the defendant's position, Lord *Holt* is reported to have said, obiter, (for it was unnecessary to the decision of the case), that no action lies against the sheriff, because he who delivered his first writ *would not take a warrant*; so it seems, he had a design only to keep the first execution in his pocket to protect the defendants goods by fraud. Though Lord *Holt* infers from the plaintiff's conduct a fraudulent intent, he does not treat that intent as essential in order to deprive him of his priority. The last case cited was *Bradley v. Wyndham* (c); there the writ was delivered nominally, with orders to execute it; there was an actual seizure by the sheriff, so that it became a question whether such seizure was void on the ground of its being colourable, and meant to protect the property.

We are, therefore of opinion, that in this case the countermand of the execution of the writ was equivalent to its withdrawal at the trial, and Bird's writ could not be considered as having been delivered to the sheriff to be executed until the order to proceed after the delivery of the plaintiff's, and consequently the rule must be absolute to enter a verdict for 27*l.* 5*s.* 11*d.*, the amount realized.

Rule absolute.

LOWETH V. SMITH and Another.

12 M. & W. 582.

Trespass for breaking and entering plaintiff's dwelling-house, and staying and continuing therein making a noise and disturbance for a long time, to wit, for four days then next following, and seizing his goods, &c. Plea, as to the breaking and entering the dwelling-house, and staying and continuing therein as in the declaration mentioned, a justification by the leave and license of the plaintiff, to take possession of certain goods. Replication, traversing the leave and license, and new assign-

(a) 11 Price, 445.

(b) 1 Ld. Raym. 252.

(c) 1 Wils. 44.

ment, that the plaintiff issued his writ, &c. not only for the breaking and entering the dwelling-house and staying and continuing therein as in the plea mentioned, but also for that the defendants, without the license of the plaintiff, stayed and continued in the dwelling-house making such noise and disturbance, &c., for other and different purposes than those in the plea mentioned, and for a much longer time, to wit, three days longer than was necessary for taking possession of the goods : Held, that the replication and new assignment were not bad for duplicity ; *time* being in the case of a continuing trespass, equally divisible for this purpose as *space*.

TRESPASS.—The declaration stated, that the defendants, on the 20th of June, 1843, with force and arms, &c., broke and entered a certain dwelling-house and brick yard of the plaintiff, situate, &c., and then made a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long time, to wit, for the space of four days then next following. It then went on to allege other trespasses, by seizing goods, &c.

Third plea, as to the breaking and entering the said dwelling-house and brick yard, and staying and continuing therein, as in the declaration mentioned, a justification, by the leave and license of the plaintiff, to take possession of certain goods and effects.

Replication, traversing such alleged leave and license ; and new assignment, that the plaintiff issued his writ, and declared thereon, not only for the breaking and entering the said dwelling-house and brick yard, and staying and continuing therein, as in the introductory part of the said third plea mentioned, and in the said plea attempted to be justified ; but also for that the defendants, with force and arms, and without the authority, and against the leave and license of the plaintiff, to wit, at the said times in the said declaration in this behalf mentioned, stayed and continued in and upon the said dwelling-house and brick yard, making such noise and disturbance as in the said declaration mentioned, for a long time, to wit, for the space of three days next after the said day in the declaration mentioned ; for other and different purposes than those in the said third plea mentioned, and also for a much longer time, to wit, for the space of three days longer than was necessary for the purpose of taking possession of the said goods, chattels and effects in the said third plea mentioned, which trespasses, so newly assigned, are other and different trespasses, &c.

Special demurrer, for duplicity and multifariousness, and for departure from the declaration.—Joinder in demurrer.

Cole, in support of the demurrer.—The declaration complains of only *one continued trespass* to the dwelling-house and brick yard, not of divers trespasses on divers days.—The third plea justifies the trespass so alleged. The plaintiff might either have replied, traversing the plea, or new assigned; but he was not entitled to do both: *Taylor v. Smith (a)*, *Cheasley v. Barnes (b)*, *Thomas v. Marsh (c)*, *Gisborne v. Wyatt (d)*, *Franks v. Morris (e)*. [*Parke, B.*—The plaintiff may traverse a right of way across the close mentioned in the declaration and also new assign extra viam. That seems to be an authority against you. Though this is only one trespass, it is one occupying some time, and which is, therefore, divisible.] There can be no trespass which does not occupy some time. In trespass for false imprisonment, and a justification under a *ca. sa.*, could the plaintiff traverse the writ, and also new assign that the defendant kept him an unreasonable time in custody? So in an action for expelling the plaintiff, and keeping him so expelled for a long time, which is all one trespass; could the plaintiff deny the right to expel him, and also new assign that the defendant kept him out longer than he ought to have done? [*Parke, R.*—Most probably the justification of the expulsion would cover the whole time.] The trespass charged in *Cheasley v. Barnes* was one which occupied a considerable time, and was laid to have been committed *diversis diebus*, which makes the case a still stronger authority. There the defendants pleaded, to a count for breaking and entering the plaintiff's close and seizing manure, and detaining it until afterwards, on the same day, and on divers other days, they took it away from the close, a justification under a *fi. fa.* against a third person; to which the plaintiff replied, admitting the judgment and writ, *de injuria absque residuo causæ*, and also new assigned, that the defendants broke and entered the close after the return of the writ; and this was held bad for dupli-

(a) 7 Taunt. 156.

(b) 10 East. 73.

(c) 5 C. & P. 596.

(d) 3 Dowl. P. C. 505.

(e) 10 East. 81, n.

city. Suppose the defendants here had only pleaded not guilty, could the plaintiff have proved several distinct trespasses? [*Parke, B.*—No; but he could have proved that the defendant entered and stayed four days; that he threw the goods out at the end of the first day, and stayed three days longer. The question is, whether a trespass by continuation in point of time is not equally severable as the traversing over a continuous space of a close. The only limitation is, that the plaintiff cannot make that, which is one cause of action in the declaration, into two in the replication. *Alderson, B.*—The declaration says, the defendants entered and stayed four days; the defendant sets up a justification, which entitled him to enter and stay for two days; to which the plaintiff replies, I deny you had any right to enter at all, but if you had, your only right was to stay two days, and you stayed two days longer without any color or authority.] If the continuing in possession amounts to a new trespass, *Cheasley v. Barnes* appears to be a direct authority.

Hayes, contra, was stopped by the court.

PARKE, B.—The case of *Cheasley v. Barnes* proceeds upon this, that there the plaintiff in his replication alleged a fresh *breaking and entering*, one only being alleged in the declaration. But *staying and continuing* in a house appears to be a divisible trespass in point of time; there is a fresh trespass on each day; then the plea *prima facie* is an answer as to the whole. The plaintiff then says, as to part of the time, the defendants had no such authority as they allege; as to the rest, they had no justification even by the license they set up. It seems to be as divisible as a trespass is in point of space, on different parts of the surface of a close.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

THE UPPER CANADA JURIST.

POINTS IN PLEADING AND PRACTICE.

NO. IV.—DEMURRERS UNDER THE NEW RULES.

By Rule 14, Easter Term, 5 Victoria, it is ordered, that “In the margin of every demurrer, before it is filed, some matter of law intended to be argued shall be stated; and if any demurrer shall be filed or delivered without such statement, or with a frivolous statement, it may be set aside as irregular, by the court, or a judge; and leave may be given to sign judgment as for want of a plea; Provided that the party demurring may, at the time of argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way.” The introduction of this rule has made decidedly beneficial alteration in the practice regarding demurrers. Before it was introduced, there were no means by which a party, whose pleading was objected to on general demurrer, could ascertain the points upon which his adversary intended to rely, and he was frequently obliged to wait until the delivery of the demurrer books to the judges for argument, when the points to be taken would of necessity be noted for the court, to determine whether he should attempt to sustain his pleading, or apply for an amendment; and if he resolved upon the latter course, he had a large amount of costs to pay, which he would in a great measure have escaped, had he been able to ascertain, on the filing of the demurrer, what the objections were, which he afterwards discovered from the book delivered to the judges. The only objection to the rule is, that it does not go far enough. It says that “some matter of law intended to be argued, shall be stated in the margin;” and if the pleading be open to a *special*, as well as a general demurrer, the matter to be argued referred to in the margin will in almost every instance be only the special cause of demurrer, leaving the

party altogether in the dark as to any point of general demurrer, and tending even more to mislead him than if the objection had been raised on the general demurrer alone. It may not be easy to remove this difficulty, but if, where a pleading objected to on *special* demurrer, is also open to a general demurrer, and *no* ground of general demurrer is stated in the margin, the rule provided that the party who demurred, and who should afterwards make a point on general demurrer, and be successful on that point alone, should receive no costs from the opposite party, in the event of an amendment of his pleading being allowed; we conceive that parties would be relieved of much of the embarrassment that is often felt now, and would much more frequently amend in the first instance, than risk the uncertainty and expense of an argument. We would not require that *all* the grounds of general demurrer should be stated, as that might give rise to much looseness in pleading; but we would treat all demurrers as general demurrers, if there were any point of general demurrer to be taken, and make a party liable to the loss of his costs, who should profess to rely upon special causes alone, and afterwards succeed on general demurrer, if the court should allow his adversary an amendment. From the terms of the rule, it would appear as if it had been intended to apply only to general demurrers, but it has frequently been held to be applicable to special demurrers; although, where the demurrer is special, it is not necessary, in order to shew a compliance with the rule, to state the special causes in the margin the same as in the body of the demurrer; but it is sufficient to refer to them as "the causes of demurrer intended to be argued, are those specially assigned"(a) It has been held, that the rule must be substantially complied with, and therefore, where the marginal note of a demurrer to a plea of justification of a libel, merely stated as cause, "that the matters disclosed in the plea contained no answer to the action," it was determined to be insufficient.(a) But if there be several grounds of objection noted, it is not necessary that the

(a) *Beverige v. Priestly*, 5 Dowl, 306; *Lindus, v. Pound*, 2 M. & W. 240; *Vorbecke v. Prarse*, 6 Scott, 406.

party should state on which of them he intends to rely. (b)

Demurrers held Frivolous.] There have been only one or two decisions in the Court of Queen's Bench in Upper Canada, on the subject of frivolous demurrers, although questions have frequently arisen in chambers; but in England, there are numerous adjudged cases, and in the following the rule was enforced against the party demurring, and the demurrer held frivolous; that a plea was dated 1832, instead of 1833; (c) a *general* demurrer to a replication *de injuria*, (to a plea of gaming in an action on a bill); (d) to the second count of a declaration by a surviving partner, because it did not state the decease of the other partner, which had been already averred in the first count; (e) to a declaration on a bill of exchange and an account stated, with one promise "to pay the said last mentioned several monies on request," on the ground that there was no promise to the count on the bill; (f) to a count on a bill of exchange, stating that I. and C. made their bill, &c., and and thereby required the defendant to pay to the drawer's order, &c., and that I. and S. indorsed the bill to the plaintiff, and because the declaration did not allege who the drawers were; (g) to a declaration in debt, "for goods sold and delivered to the defendant by the plaintiff at his request," on the ground of the statement being ambiguous; (h) to a count on a declaration against the acceptor of a bill of exchange, made payable at "Messrs. Cunleffe & Co., bankers, London," because it was not alleged to have been presented for payment at the bankers, the acceptance being, by the force of the statute, a general acceptance; (i) to a count in assumpsit, setting out an instrument under seal, but stating a new consideration from which the promise arose, on the ground that the form of action should have been *covenant*, and not *assumpsit*; (j) to a declaration on a bill of exchange, where the declaration stated that "one J. Banks" made his bill, because the initial only of the first name of the drawer was

(a) *Ross v. Robeson*, 3 Dowl., 779. (b) *Whitmore v. Nicholls*, 5 Dowl., 521.
 (c) *Neal v. Richardson*, 2 Dowl., 89. (d) *Curtis v. Headfort*, 6 Dowl., 495.
 (e) *Underhill v. Fuller*, 3 Dowl., 495. (f) *Chevers v. Parkington*, 6 Dowl. 75.
 (g) *Knill v. Stockdale*, 8 Dowl., 772.
 (h) *Doremer v. Fenna*, 7 M. & W. 439; *Pigeon v. Osborne*, 9 Dowl., 511.
 (i) *Skelton v. Halsted*, 2 Dowl. N. S., 29.
 (j) *Twight v. Prescott*, 2 Dowl. N. S. 4.

given, and not his name in full;(a) and in our own court, to a declaration on a bill, alleging an indorsement by—Laurie and—Burns, trading under the name of Laurie and Burns, because the christian names of Laurie and Burns were not set out;(b) and where in assumpsit for goods sold and delivered, the defendant pleaded that the goods were with the knowledge, privity and consent of the plaintiffs, sold and delivered to the defendant by H., being then the factor of the plaintiffs, in H.'s name as the owner, and as his own goods, the defendant not knowing that the plaintiffs were interested, and that he had a set-off of a debt due from H. Replication, that the goods were not, with the knowledge, privity or consent of the plaintiffs, sold and delivered to the defendant by H., in his H.'s name, as the owner, and as his own goods, in manner and form, &c. Held, a good replication; and a demurrer, on the ground that it involved a negative pregnant, was set aside as frivolous.(c) And where the declaration in an action on a promissory note, contained no statement of the time when the note became payable, and the defendant demurred thereto on that ground, the demurrer was set aside as frivolous.(d)

Demurrers held not frivolous.] The court will not set aside a demurrer as frivolous, where the point raised fairly admits of argument:(e) and where to an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that he had accepted the bill for the accommodation of one G.; that the plaintiff was aware of that fact; and that after the bill had become due, the plaintiff and G. agreed that the latter should give a fresh bill, and should also deposit certain deeds as a collateral security; and the plaintiff replied de injuria, the court refused to set aside a demurrer to the replication as frivolous(f) In an action by the indorsee against the maker of a promissory note, the declaration stated that the defendant made and delivered his promissory note to T. C., and promised to pay T. C. or order £52 10s. by two equal

(a) *Braithwaite v. Harrison*, 7 Jurist, 888; 1 D. & L., 210.

(b) 1 U. C. Jurist, 413.

(c) *Pigeon v. Osborn*, 12 Ad. & El. 715.

(d) *Gurney v. Hill*, 2 Dowl. N. S., 936. (e) *Dalton v. McIntyre*, 1 Dowl. N. S., 76.

(f) *Smith v. Whatley*, 1 D. & L., 190.

instalments on 1st May, 1843, and 1st November, 1843, and that the whole amount should become immediately payable on default being made of any part of the first instalment; and that T. C. indorsed the note to the plaintiff. This declaration having been demurred to, on the ground that the note was not made according to the custom of merchants, and therefore was not negotiable, the court refused to set the demurrer aside as frivolous.(a)

Form of Motion, on setting aside Frivolous Demurrer.] In moving to set aside the demurrer, there must be an affidavit stating the substance of the pleadings, or with a copy of them annexed, and the rule must be drawn up on reading the pleadings. A rule for setting aside a demurrer to a replication as frivolous, ought to be drawn up on reading the pleas, as well as the other pleadings in the cause.(b) The rule is only *nisi* in the first instance;(c) and it is too late to apply to set the demurrer aside, after joining in demurrer.(d)

Joinder in Demurrer.] By Rule 19 of the new rules, "It shall not be necessary to furnish issue books or paper books in any case; and in all special pleadings where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed as if the cause were at issue; and the clerk on passing the record shall enter the similitur, as of course." Under this rule the plaintiff may, on demurrer to the defendant's pleading, at once add the joinder in demurrer, without any demand; but the defendant cannot do so; and he must proceed to demand a joinder in demurrer, where he demurs to the plaintiff's pleading; and, if it be not added in eight days, he may sign judgment of non pros.

Notice of Argument.] Formerly, it was necessary to take out and serve a concilium, before a demurrer could be argued; but now, by rule of 20 of the new rules, "no motion or rule for a concilium shall be required, but demurrers, as well as all special cases and special verdicts, shall be set down for argument at the request of either party, with the

(a) *Carlton v. Kennedy*, 7 Jur. 1115; see *Oridge v. Sherborne*, 11 M.&W. 376.

(b) *Homer v. Anderton*, 9 Dowl. 119; *Daniel v. Lewis*, 1 Dowl. N. S. 542.

(c) *Kinnear v. Keane*, 3 Dowl. 154. (d) *Norton v. McIntosh*, 7 Dowl. 529.

officer of the court; and notice thereof shall be given to such party to the opposite party four days before the time appointed for such argument." Under the similar rule in England, it has been considered that, in ordinary cases, this notice should be given in sufficient time to enable the opposite party to prepare his demurrer books; otherwise the court may refuse to hear the demurrer, and perhaps allow the objecting party his costs for appearing to make the objection. (a) And it is irregular to deliver a joinder in demurrer, and *at the same time* a notice that the demurrer has been sent down for argument. (b)

Delivery of Demurrer Book.] By rule of Easter Term, 7 Victoria, rescinding rule 21 Easter Term, 5 Victoria, "four days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case or special verdict, to the chief justice and senior judge sitting in court during that term, and the defendant shall deliver copies to the two other judges; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the crown and pleas a sufficient sum to pay for such copies." If demurrer books are not delivered to all the judges, the case will be struck out of the paper; (c) though, when the defendant does not intend to support his pleadings, the court will give judgment for the plaintiff, though all the books have not been delivered. (d) And when the plaintiff, upon the defendant's default, delivers copies of the demurrer books to all the judges, he is entitled to judgment, unless the defendant appears and pays for his half of the demurrer books. (e)

Points for Argument.] The proviso in Rule 14, ante page 321, allows the party demurring on the argument of a demurrer, to insist upon any further matter of law (not stated on the margin of the demurrer at the time of filing and service,) of which notice will have to be given to the court in the usual way, and that usual way is pointed out by the rules

(a) *Britten v. Britten*, 2 Dowl. 239.

(b) *Gibson v. Mottram*, 7 Scott N. R. 535: 1 D. & L. 815.

(c) *Abraham v. Cooke*, 3 Dowl. 315.

(d) *Scott v. Robson*, 5 Tyr. 717.

(e) *Wilton v. Scarlett*, 1 D. & M. 810.

E. 2, J. 2, M. 38 Geo. III.—“In all books to be delivered, to the judges, the exceptions intended to be insisted on in argument shall be marked by the party who objects to the pleadings in the margin of the books he delivers ;” and, if each party intends to object to the other’s pleading, he should state his objections in the margin also, otherwise he cannot enter upon them in the argument.(a) But it is not necessary that he should point out his objections specifically : it is sufficient if a plea be objected to “as affording no answer to the action, and being bad in substance ; and per Maule, J., “I do not think that the marginal note was intended for the advantage of the parties, but of the court. The practice has been for the parties to state their points for the information of the court, and for the opposite parties to go to judge’s chambers to ascertain what they are.” (b) And where a defendant demurs to a replication, and the plaintiff delivers to the judge’s clerk points for argument, impugning the pleas, it is the duty of the defendant to obtain such points from the judge’s clerk ; and if the defendant fail to do so, the court, upon argument, will nevertheless hear the plaintiff’s objections to the pleas, although the defendant was not previously aware of such objections ;(c) but if, on demurrer to a replication, the plaintiff, on argument, desires to object to the defendant’s plea, but has given no notice of objection on his demurrer book, the court will not hear the objection, or will give time to the opposite party to prepare an answer to it. But, although the court will not hear argument, they are not precluded from giving judgment to the party who appears entitled to it on the whole record.(d)

(a) *Darling v. Gurney*, 2 Dowl. 101 ; *Arbouin v. Anderson*, 1 Q.B. 498.

(b) *Scott et al. v. Chappelow*, 2 Dowl. N. S. 751.

(c) *Garrard v. Hardey*, 1 D. & L. 51.

(d) *Vanorman v. Leonard*, East. 8 Vic. in this court, not yet reported.

OF CONTRACTS OPERATING IN RESTRAINT OF TRADE.

The exercise of a lawful avocation, as a means of subsistence, is recognized by the common law both as a *duty* and a *right*. The former simply requires an individual to exert his talents in some way useful to the public for the support of the commonwealth and the maintenance of himself and his family, but it leaves him at liberty to select in what particular section of society he will apply them. The right of an individual, therefore, being subordinate only to the rights of the community, extends to every avocation not in itself unlawful, and generally to every locality within the realm.

Hence it is that monopolies have ever been denounced both by the civil and common law. "There are," says Lord Coke, "three inseparable incidents to every monopoly against the commonwealth:—1. That the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases. 2. That after the monopoly granted, the commodity is not so good and merchantable as it was before for the patentee having the sole trade regards only his private benefit and not the commonwealth. 3. It tends to the impoverishment of divers artificers and others who before, by the labour of their hands in their art and trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary."(*a*) That case decided that a grant from the crown of the sole privilege of importing and making playing cards was void, though it was strongly urged that cards were not articles of necessary use, but "mere things of vanity and the occasion of loss of time," and many other evils, and therefore it belonged to the crown to take order for the convenient and moderate use of them. So it was previously held of patent granted to an individual for the sole importation and sale of sweet wine, and he was severely punished for procuring it;(*b*) and in the early part of the reign of Elizabeth, a patent granted by Philip and Mary to the Corporation of

(*a*) Case of Monopolies, 11 Co., 84.

(*b*) 3 Ins., 181

Southampton, by which all wines of a certain quality brought from foreign parts into England, whether by an alien or a liege-man, were to be landed at that port, was declared by all the judges to be void.(a)

It is obvious that general restrictions upon trade, namely, such as prohibit persons from exercising any known lawful avocation, are contrary to the policy of the law. We have a few instances of such restraint imposed by the legislature. The statute 37 Edw. III., c. 5, prohibited merchants from using more than one sort of merchandise; and c. 6 of the same year enacted, "that the artificers and people of mystery hold themselves every one to his mystery, and that none use other mystery than that which he has chosen." But by the parliament of the succeeding year it was declared that "all people should be as free as they were at any time before the said ordinance."(b) The statute of Elizabeth 5, c. 4, which prohibited a person from setting up a trade before he had served an apprenticeship of seven years to it, aimed rather at the regulation and improvement than the restriction of it. Yet its provisions were cramped from time to time by judicial construction,(c) and at length were repealed by statute 54 Geo. III., c. 96. On the other hand, the common law freedom of trade is guaranteed by the Magna Charta, and is established by several succeeding statutes,(d) but notwithstanding these, it was frequently infringed upon by charters and patents from the crown, which were upheld by the Star-Chamber in opposition to the courts of law, until the statute 21 Jas. I., c. 3, subjected them to the rules of the common law, and declared all such grants, &c., with a few exceptions, authorized by public policy, contrary to law and void.

Where, however, the restriction is confined to a particular place, the objection above noticed does not apply. There is not that proximate tendency to monopoly in these partial restraints which belongs to those of the other class, and which causes them to be regarded as prejudicial to the

(a) 3 Inst., 181.

(b) 38 Edw. III., c. 2; see 11 Co., 54.

(c) See Ray., 514, 1179; Burr., 91; 2 Str., 1066.

(d) 9 Edw. III., c. 1 and 2; 25 Edw. III., c. 2; 27 Edw. III., c. 11; 2 Rich. II., c. 1; 11 Rich. II., c. 7, *et alia*.

interests of the community. (a) A monopoly is the grant of the *sole* buying, selling, making, &c., throughout England. The common law regards the community as a whole. No person can carry on his trade in all parts of the country at once, nor deal with all people, and the public interest does not suffer by his being excluded from a particular spot. Whatever objection exists to partial or qualified restraints of trade is founded, not on the presumed detriment to the public, but to the individual by infringing on his rights. There is nothing in them inherently vicious, as in the case of general restraints, consequently such partial restraints, may be imposed, provided it be done without violence to individual right, (b) But as this is a right of so much importance, the law looks with peculiar jealousy upon every thing which tends to abridge or take it away.

In two instances the common law allowed of restrictions, which appear at first sight to militate against these principles. The one was in the case of a patent for the sole making, selling, &c., of any kind of new manufacture, and the other of a custom, or bye-law founded upon it, whereby strangers were prohibited from carrying on trade within certain limits. The first, however, does not fall within the definition of a monopoly, which is the privilege of sole making, &c., any *known* manufacture, and the public have no pretence of right to that which was not in existence before. The only reward the patentee gains is the exclusive privilege of manufacture

(a) See per Parker, C. J., in *Mitchell v. Reynolds*, 1 P. Wms. 181.

(b) The doctrine laid down in the text appears to have been lately controverted by a high authority. In *Hitchcock v. Coker*, 1 N. & P. 816, the Lord Chief Justice, in delivering the judgment of the Court of Queen's Bench, observed:—"It may, indeed, be said, that all such agreements interfere in some degree with the *public interest*, and great difficulty may attend the application of that test from the variety of opinions that may exist as to the *quantum* of interference with the public interest, which the law ought to permit. But on the other hand, it appears quite safe to hold that the law will not enforce any agreement for *curtailing the rights* both of the *public* and the contracting party, without its being necessary for the protection of him in whose favour it is made." It is with great deference submitted, that the law does not in any instance allow the rights of the public to be curtailed by the contract of individuals. It would be an anomaly, and a dangerous one to hold, that any two persons may, for their own advantage, deprive society of any fraction of a right which is essential to its very existence. The test which the common law applies to ascertain the quality of an act is, whether its tendency is to injure the *public generally*, and the maxim is, that what may not be done by all must not be done by any one. If this be admitted, it cannot be necessary to call in aid the doctrine contained in the foregoing extract, for no injury is presumed to accrue to the public from contracts for partial restraint.

for a given period. This period was limited by the statute of Sames, and such patents left to their operation at common law, but beyond that period the benefit of the invention devolves on the public, to whom the patent itself secures every necessary information.

A custom is *lex loci*, and no person has any right to the benefits of a place exempt from the laws of that place. Hence the right of trading was in many cities confined by immemorial custom to freemen. But this privilege could not commence by charter,"(a) nor could a bye-law be supported which tended to render the custom more stringent.(b) Even these privileges have been lately swept away, the statute 5 & 6 Will. IV. c. 76, declaring, notwithstanding any such custom or bye-law every person in any borough may keep any shop for the sale of all lawful wares and merchandise by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within every borough."

These remarks are intended to introduce a brief view of the law on the subject of voluntary restraints of trade, a species, of contract which is daily coming under the notice of the courts, and which recent decisions have settled upon sound and intelligible principles.

From what has been said it will be obvious that every contract or engagement, by which a person binds himself to abstain altogether from the exercise of a known lawful avocation, is absolutely void on grounds of public policy;(c) consequently, it cannot be rendered valid by any consideration moving to the contracting party. The only question is, whether the restraint be such as to prevent him from carrying on the trade any where in the kingdom. It does not seem material whether it be limited or indefinite as to time; a prohibition for ten years would fall as much within the principle as a prohibition for life. And it is equally immaterial whether it relate to the party's own trade, to that which he had used as a means of subsistence, or to any other(d)

(a) Taylor's of Ipswich case, 11 Co. 53.

(b) Davenant v. Hurdle, cited 11 Co. 86.

(c) See Homer v. Ashford, 3 Beng. 322.

(d) See Prugnell v. Gosse, All. 67; Rogers v. Parry, 2 Buls. 136; Mitchell v. Reynolds, 1 P. Wms. 181.

The rule, however, is confined to the exercise of some *known* trade or calling; there is nothing to prevent a person from selling a *secret* in a trade, and restraining himself from using it for ever afterwards.(a)

With regard to partial restraints, the rule is different. An individual may barter away his right to trade in a particular place, or manner, or with particular persons, as well as he may sell his freehold; but out of regard to a right of such value and importance, the law requires to contracts of this description two qualifications: first, that they be founded on a good and valuable consideration; and, secondly, that the restraint be in point of law reasonable.

1. Of the consideration. In the recent case of *Hitchcock v. Coker*, in the Exchequer Chamber,(b) which must for the future be deemed a leading case on the subject, it was contended that the consideration for such restraint must not only be good and valuable in contemplation of law, that is, such as might in its nature be an equivalent to *any* person under *any* circumstances, but that it should be adequate also in fact, and that it belonged to the courts to judge of its sufficiency in each particular instance. The language employed by the courts in the earlier cases certainly appears to favour the position. In *Mitchell v. Reynolds*,(c) the Lord Chief Justice Parker says, “wherever a *sufficient* consideration *appears* to make it a proper and useful contract, and such as could not be set aside without injury to a fair contractor, it ought to be maintained.” And in *Young v. Timmins*,(d) the court observed, “where one party agrees with another to employ him, and the latter agrees not to work for any third person, such agreement is a partial restraint of trade, and must be supported by an *adequate* consideration. The question then in the present case is, whether there is an *adequate* consideration for the stipulations in this agreement on the part of the bankrupt.” So in *Gale v. Reid*,(e) Lord Ellenborough remarks, “it remains to be considered whether the covenant in question is void as being a particular restraint of the trade without *adequate* consideration.” But in the case alluded to, the court, in giving judg-

(a) *Bryson v. Williams*, 1 S. & S. 74 (b) 6 Ad. & E. 438.
 (c) 1 P. Wms. 181. (d) 1 C. & J. 331; 1 Tyr. 226. (e) 8 Ea, 80.

ment observed, "If by the expression (*adequate*) it is intended that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favored in law, must either be a fraud on the rights of the party restrained, or a mere *nudum pactum*, and therefore void. But if by *adequacy* of consideration more is intended, and that the court must weigh whether the consideration is equal in value to what the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the court in every particular case which it has no means whatever to execute. It is impossible for the court, looking at the record, to say whether in any particular case the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another, and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is a consideration for the bargain, and that such consideration is a *legal consideration* and *of some value*." This case decides that the receiving a person as an assistant in the trade of a chemist and druggist, is a good consideration for an engagement that he would not at any time thereafter set up the trade in the town of Taunton or within three miles thereof.(a) So the taking the party as an apprentice,(a) and the assignment of a lease and business(b) have been severally holden sufficient. And a contract to keep the defendant in full employment in his trade is a good consideration for an engagement not to work for any one else,(c) or not to carry on the trade on his own account.(d) So it has been frequently held that a brewer, on letting a public house, might bind the tenant to take all his beer of his landlord.(e) In articles of partnership

(a) See also *Horner v. Graves*, 5 M. & P., 768; *Davis v. Mason*, 5 T. R., 118.

(b) *Broad v. Jollyfe*, 2 Roll., 201; *Prugnell v. Gosse*, All., 67; *Mitchell v. Reynolds*, 1 P. Wms., 181.

(c) *Young v. Timmins*, 1 Tyr., 226.

(d) *Wallis v. Day*, 2 M. & W., 273; *Gale v. Reed*, 8 Ea., 80.

(e) *Holcomb v. Hewson*, 2 Camp., 39; *Cooper v. Turnhill*, 3 Camp., 285; *Jones v. Edney*, id. And see *Hearn v. Griffin*, 2 Ch. 407.

nothing is more common than a stipulation that neither partner shall carry on the trade on his own account; and where upon the dissolution of a partnership it was agreed that the retiring party should be allowed a certain commission upon all goods made on his recommendation by the continuing partners, it was held that it was a good consideration for a covenant for his part that he would not during his life carry on the business on his own account, and would employ the latter exclusively to make all goods which should be ordered of him.^(a) The doctrine laid down in the case of *Hitchcock v. Coker* has been recently confirmed by the case of *Archer's Executors v. Marsh*,^(b) where it was decided that the defendant was bound by a contract that neither he nor his executors, &c., should at any time thereafter carry on the business of a common carrier on a line of road which he had relinquished to the plaintiff, though the consideration was only to receive a third part of the carriage of such butter as the plaintiff should carry on the line of road for one year. And in *Leighton v. Wales*,^(c) the entering into partnership with the plaintiff for the purpose of running a coach from Croydon to London was held a sufficient consideration for an agreement in the articles that in the event of a dissolution the defendant should not, while the plaintiff continued to carry on the trade, either on his own account or that of any other person, run any coach on the line of road within certain hours, though by the same articles the plaintiff had the option of putting an end to the partnership by giving a month's notice. There is no case where the consideration was merely a pecuniary one, though there seems no reason why such, if made *bonâ fide*, should not be good.^(d)

There is no distinction, as regards the validity of the contract, between parol agreements and specialties, though it was formerly considered that a bond with a penalty could not be supported. In *Mitchell v. Reynolds*, Parker, C. J., says, "the true distinction is not between promises and bonds, but between contracts with and without a consideration; and

(a) *Gale v. Reed*, 8 Ea., 80; see *Wickens v. Evans*, 3 Y. & J., 318.

(b) 15 Law, J., 244, Q. B.

(c) 3 M. & W., 545.

(d) But see *Rogers v. Parry*, 2 Buls., 136; said by Parker, C. J., in *Mitchell v. Reynolds*, to be misreported.

wherever a sufficient consideration appears to make it a proper and useful contract, &c., it ought to be maintained. But there is one material difference between a bond for payment of money, or for some act not against common right, and a bond in restraint of trade. The former needs no consideration, or rather the law presumes a consideration, and will not allow it to be questioned unless fraud be shown ;(a) but the latter must be made on a good and valuable consideration, or it be void.(b) Whether it is essential that the consideration should *appear* on the face of the instrument has never been decided. In the case first quoted the court intimated an opinion that it might be *averred* in support of a bond or other contract under seal, and Best, J., in *Homer v. Ashford*,(c) threw out a dictum to the same effect. And it seems the rules of evidence do not prohibit proof of a consideration consistent with the deed, though if it profess to be made on a particular consideration, evidence of a different consideration would be inadmissible. It is clear, however, that the consideration must be shewn by the party pleading, in order that the court may judge of its sufficiency in point of law. On this ground, it is probable the cases referred to in *Prugnell v. Gosse*.(d) proceeded. The one was a bond not to use the trade of a mercer in Nottingham, and the other was a bond not to carry on the business of a haberdasher for four years, and both these were adjudged void. It is of course advisable, even if it should be held not to be necessary, to set the consideration in the instrument, both to save the necessity of bringing evidence, and to estop the defendant from afterwards disputing it. In one case, where the declaration averred, that the defendants, “for the considerations in the deed mentioned,” covenanted, &c., it was held, on general demurrer, that the consideration must be taken to be good and sufficient. and the plaintiff had judgment.(e) In such cases, therefore, the objection must be taken by special demurrer.

If the contract be not under seal, the consideration must be

(a) Plow. 308 ; 7 T. R. 477.

(b) See also *Prugnell v. Gosse*, All. 67 ; *Ten Tailors of Ex. v. Clarke*, 1 Sho. 350.

(c) 3 Bing. 322 ; 11 Moore, 91.

(d) All. 67.

(e) *Homer v. Ashford*, 3 Bing. 322.

set out in the instrument as well as averred in the declaration, since the law presumes nothing in favour of a parol contract.

2. As to the degree of restraint which the law allows. The modes by which a party may be restricted in the exercise of a trade or business, are too diversified to admit of classification. The most common species of restraint is that by which a person is prohibited from carrying it on within certain limits, as to which the principle is thus stated by Lord Ellenborough: "The restraint on one side meant to be enforced should be coextensive only with the benefits meant to be enjoyed on the other.") And by Tindal, C. J.: "Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable." (b) This principle is equally applicable to every other species of restraint, and is the only measure the law could propound. To lay down any topical boundaries, would be to put a limit to men's enterprise, and thus defeat the end and object it contemplates, while it would be equally improper with a view to the rights of the restrained party, to leave them open to whatever limits the cupidity of the other might suggest.

In the earlier cases on the subject, the restriction is generally confined to a certain spot, so that the question of extent did not arise. (c) In *Davis v. Mason*, (d) the condition of the bond was, not to exercise the business of a surgeon, apothecary and man midwife, within the distance of ten miles from Thetford, and the court held it good. In the subsequent case of *Haywood v. Young*, (e) twenty miles were considered not an unreasonable limit for a surgeon. In *Hardy v. Moreton*, (f) the defendant, on dissolving partnership with the plaintiff, entered into a bond not to sell any quantity of brandy less than six gallons within the cities of London or Westminster, or within five miles thereof, and this was upheld both at law and in equity. But the strongest case is that of *Bunn v. Guy*, (g)

(a) *Gale v. Reid*, 8 East. 80.

(b) *Young v. Timmins*, 1 Tyr. 226.

(c) *Broad v. Jollyfe*, Cro. Jac. 569; *Bragg v. Tanner*, Palm. 172; *Rogers v. Parry*, 2 Buls. 136; *Prugnell v. Gosse*, All. 67.

(d) 5 T. R. 118.

(e) 2 Ch. 407.

(f) 1 B. C. C. 419.

(g) 4 East 190.

where it was held that a limit of 150 miles round London could not be considered unreasonable for an attorney. This case was recognised in the recent case of *Horner v. Graves*, (a) where it was held, however, that an agreement not to practise as a surgeon-dentist within 100 miles of York, was void for its extent.

The limit assigned by judicial decision as necessary for one kind of business, can of course afford no criterion for any other. The reasonableness of the restraint depends on the particular nature of the business, and the extent to which it may be carried on. The decision in *Bunn v. Guy* was sanctioned on the ground that an attorney might do so much by correspondence and agents, while the business of a surgeon could not be carried on but by personal attendance; and therefore a limit which was reasonable and necessary for the one, was highly unreasonable and unnecessary for the protection of the other.

It is observable that many other circumstances which would seem involved in the inquiry, whether a given limit be necessary to another's interest, such as his capacity and skill, the populousness of the neighbourhood, the number of competitors, &c., &c., have never been taken into account in estimating the legality of the restraint, though in the case of *Hitchcock v. Coker*, the Lord Chief Justice intimated that such circumstances might affect the question of extent. But great difficulties would follow the introduction of such an inquiry. Circumstances such as these are of too fluctuating and adventitious a character, besides being too difficult of proof, to afford a safe ground of decision. The better mode seems to be in dealing with this to confine the inquiry, as in the question of consideration, to what might under any circumstances and to any individual be a necessary limit for the protection of the business in question, leaving the rest to the discretion of the contracting parties. It is for this reason that the legality of the restraint is a question for the court, not for the jury. If these circumstances were taken into the account, it would be purely a question of fact, and the jury alone must decide it.

(a) 5 M. & P. 768.

It is not necessary that the contract should contain any limitation as to time. In *Broad v. Jollyfe*, (a) the agreement was, that the defendant would not "any longer" keep a shop in Newport. In *Bragg v. Tanner*, (b) the assumpsit alleged was to pay 100*l.* if the defendant "thenceforward" kept a draper's shop in Newgate Market. And in *Prugnell v. Gosse*, (c) *Cheesman v. Nainby*, (d) and the more recent cases of *Young v. Timmins*, (e) *Horner v. Graves*, (f) and *Bunn v. Guy*, (g) above alluded to, the restraint was indefinite in point of time. But in *Cheesman v. Nainby*, (h) the counsel for the plaintiff seemed to admit that the bond could not be put in suit after the death of the obligee; and the Court of Queen's Bench were of opinion, in the case of *Hitchcock v. Coker*, (i) that an agreement "that if the defendant should *at any time thereafter* carry on the trades of a chemist and druggist, or either of them, within the town of Taunton, or within three miles thereof, then that he would pay to the plaintiff, *his executors, administrators, or assigns*, the sum of 500*l.*," was void, the prohibition attaching on the defendant after the plaintiff's death, and being therefore larger than was necessary for his protection. But the Court of Exchequer Chamber reversed the judgment; "The good-will of a business," said Tindal, C. J., in giving judgment, "is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of the trader. And if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which the master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further and should be allowed to continue if the master sells the trade or bequeaths it, or it becomes the property of his personal representatives; that is, if it is reasonable that the master should

(a) Cro. Jac. 569.

(d) 2 Str. 739.

(g) 4 East. 190.

(b) Palm. 172.

(e) 1 Tyr. 226.

(h) 2 Str. 739.

(c) All. 67.

(f) 5 M. & P. 768.

(i) 1 N. & P. 800.

by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life."

Another class of cases depending upon the same principle is where the restraint has reference to dealing with particular customers. The first of this kind is the case of *Hunlocke v. Blacklowe*, reported in 2 Saund. 156, in which the defendant having assigned his business to the plaintiff, bound himself not to exercise the trade of a tailor with any of the customers named in the schedule. The judgment for the plaintiff proceeded on another ground; but in a note the learned editor says, "though a bond not to use a trade anywhere in England is void, as being too general a restraint of trade, yet if such bond be not to use a trade at a particular place it is good. For the same reason, it seems, a bond not to use a trade with *particular customers by name*, if founded on a good consideration, is also valid." The case of *Thompson v. Harvey (a)* is not an authority against this position. The restraint there is of a different nature, and it does not appear that the obligee could have any interest in enforcing it. It was an action of debt on bond conditioned "not to buy sheep's feet, &c. of any others but such and such, and not to *buy above a certain quantity*." The latter stipulation is clearly illegal, and the court held the instrument void.

As a party may be prohibited by contract from dealing with particular customers, so he may be bound to trade exclusively with another. Restraints of this kind frequently occur in public house leases, obliging the tenant to buy all his beer, &c. of the lessor, and though the courts have frequently expressed their disapprobation of them, they have been uniformly upheld. There is one condition, however, which the law incorporates into all contracts of this kind, namely,

(a) 1 Sho. 2.

that the article supplied be good and saleable. In *Thornton v. Sherratt*, (a) a case turning on the same principle, the defendant, an innkeeper, having compounded with his creditors, they had given him a release, which contained a proviso that he should continue to deal with them in the articles of their respective trades during the residue of his term in the public house which he then occupied. The action was brought by a brewer, and the question submitted to the jury was, whether the beer supplied by him was *good and saleable*, which direction was approved of by the court, and the defendant had a verdict. The same doctrine had been advanced by Lord Ellenborough in *Cooper v. Twihill*, (b) and was subsequently held in *Holcombe v. Hewson*, (c) and recognised in *Jones v. Edney*.(d)

In *Morris v. Colman*, (e) on a motion to dissolve an injunction, a question arose respecting the validity of an agreement, by which the defendant was restrained from writing dramatic pieces for any other theatre than that of the plaintiff, and the Lord Chancellor remarked, "The contract is not unreasonable. Why should they not engage for the talents of each other? The ground might be supposed that nothing could be made of the theatre without exhibiting the talents of each other."

Where, however, an individual engages to work exclusively for another, there must be a corresponding engagement on his part to give the restrained party full employment; otherwise the contract fails for want of consideration. Thus in *Young and another, assignees of Ireland, v. Timmins*, (f) it appeared that the bankrupt, a working brass-founder at Birmingham, had entered into an agreement with the defendants to work for them during their joint lives as before, in a good manner, and at general and proper prices, and that he would not work for or execute the orders of any other person without the consent in writing of the defendants. The defendants agreed to employ the bankrupt during their joint lives, in executing their orders, *as before*, and upon the like or other usual terms, subject to the provisoes after mentioned. Then

(a) 8 Taunt. 529

(c) 2 Camp. 391.

(e) 18 Ves. 437.

(b) Referred to in note 3 Camp. 285.

(d) 3 Camp. 285.

(f) 1 Tyr. 226.

followed a proviso that the defendants might put an end to the agreement by giving the bankrupt three months' notice, and that in case they had occasion, or should be under the necessity by reason of the urgency or extent of orders, "or should otherwise think fit," they should be at liberty to employ any other person without releasing the bankrupt. There was also a proviso that the bankrupt might take the orders of any person in London, or within six miles thereof. The court held the agreement void for want of mutuality, the defendants not being bound to give the bankrupt full employment. (a)

Lastly. The law leaves a person at liberty to exercise his trade in what capacity he pleases, so that he does not stipulate for a total and absolute restraint. In *Gale v. Reed*, so often cited, a contract by which a retiring partner bound himself to carry all orders which he should receive to the continuing partners, who were to allow him a certain commission thereon, and not to carry on the business on his account for ever afterwards, was held valid. And in the recent case of *Wallis v. Day*, (b) the plaintiff, a common carrier, having sold to the defendants the good-will of his business, covenanted that he would not thenceforth either by himself or by any other person carry on the said business, but would during his life serve the defendants as assistant therein; in consideration of which the defendants covenanted to pay him for fifteen years the weekly sum of 2*l.* 3*s.* 10*d.*, and for the remainder of his life 1*l.* 3*s.* 10*d.* The action was brought for non-payment of the weekly salary. It was objected on demurrer, that a contract of servitude for a person's life was void, and the agreement was moreover void as being too large a restraint of trade. But the court overruled both objections, and gave judgment for the plaintiff.

It may be observed that the sale of the good-will of a business does not of itself import restraint; (c) but if there are any circumstances in the transaction from which an understanding to that effect may be inferred, though there

(a) And see *Gale v. Reed*, 8 East. 80. (b) 2 M. & W. 273.

(c) *Shackle v. Baker*, 14 Ves. 468.

is no stipulation not to set up the trade, a court of equity will interfere by injunction.(a)

The remedy for breach of contracts of this description is, either at law for the recovery of the penalty or damages, or in equity for a specific performance, or both.(b)

Where a certain sum is agreed on by the parties to be paid on a breach as for liquidated damages, it seems that the payment of the amount operates at law as a repurchase of the right;(c) but where it appears that the main object of the agreement was to secure the exclusive trade, and the damages are only accessional, a court of equity will relieve against the judgment, by directing an issue of *quantum damnificatus*, and restrain the party from committing further breaches.

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CASES IN THE ENGLISH COURTS.

MASON v. FARNELL.

12 M. & W. 674.

In *detinue*, the defendant cannot, under the pleas of *non detinet* and *not possessed*, shew that he had a common interest with the plaintiff in the property sought to be recovered, e. g. that he was tenant in common; such defence ought to be specially pleaded. The assent of an executor to a bequest is not a matter of law, but a question of fact for the jury.

Detinue. The declaration stated, that the plaintiff was possessed, as of his own property, of certain deeds of great value, to wit, &c., and being so possessed, casually lost the said deeds, and the same afterwards, to wit, &c., came to the possession of the defendant by finding. Breach, that the defendant refused to deliver the same to the plaintiff. Pleas, first, *non detinet*; secondly, that the plaintiff was not lawfully possessed, as of his own property, of the said deeds. At the trial, before Lord *Denman*, C. J., at the last summer assizes at Norwich, the following facts appeared in evidence:—The defendant and a Mr. Warner had been appointed trustees and

(a) *Cruttwell v. Lye*, 17 Ves. 385.

(b) *Hardy v. Martin*, 1 B. & C. 419; *Williams v. Williams*, 2 Swanst. 253, and cases cited in note.

(c) Per Parkes, C. J., in *Mitchell v. Reynolds*, 1 P. Wms. 181.

executors under the will of Sarah Mason, and the plaintiff was one of the nine children of Mrs. Mason, and one of the residuary legatees. The action was brought to recover the title deeds of part of the leasehold estate of the testatrix, which had been agreed to be sold to the plaintiff by the defendant and Warner, but the conveyance of which was signed by Warner only, and not by the defendant. On the part of the defendant, it was contended that the action could not be maintained, as the defendant had assented to the legacy to himself as *trustee*; and therefore that he was tenant in common with the plaintiff in the deeds sought to be recovered. On the other hand it was insisted, that the defendant and Warner had agreed to sell the property in their character of executors and not of trustees; and, therefore, that the conveyance by Warner alone to the plaintiff gave him a title to maintain the action. It was also contended, on the part of the plaintiff, that the defence in question was not open to the defendant under the present pleas. The learned judge was of opinion, that the fact of the defendant's assent was a matter of law; but he reserved the point, and, on the jury finding a verdict for the plaintiff, gave the defendant leave to move to enter a nonsuit.

Byles, Serjt., having, in Michaelmas Term last, obtained a rule accordingly,

Andrews (*Palmer* with him) shewed cause in Hilary term [January 18]. First, the defendant had not assented to take the leasehold property in question in his character of legatee, but as executor only; and Warner and Farnell, the defendant, enter into a contract to sell the property in that character; and, therefore, the conveyance executed by Warner passed the property, it being leasehold, to the plaintiff. In *Simpson v. Gutteridge* (a) it was held, that an assignment, which professed to be an assignment by two executors, passed the whole interest, though executed by one only. And Sir Thomas Plumer, V. C., there says, "that where one of several joint-tenants, or tenants in common, executes a deed, it passes only the share of the party so executing; but several

(a) 1 Mad. 616.

executors are considered only as one, and a gift, sale, &c. by one executor is as effectual as if all of them had joined." And he then cites Dyer, 23 b, where it is said, "If two executors have a term, and one grants to a stranger all that belongs to him, the whole term passes, inasmuch as each of them has an entire authority and interest in the term as executor; but of other joint tenants of a term it is otherwise; so there is a diversity." And the Vice-Chancellor adds, "This doctrine has been constantly recognised. Each executor has an entire interest in the term." The conveyance, therefore, in this case passed the whole interest to the plaintiff. Secondly, the defence, that the plaintiff is tenant in common with the defendant, cannot be set up under the pleas of non detinet and not possessed. If that were allowed, it would do away with all the advantages to be derived from the new rules in this respect, as the party would not know what he was to come prepared to try. The case of lien in trover stands on different grounds, as there the plaintiff has no right to the goods until he has satisfied the lien. He was then stopped by the court, who called on

E. V. Williams (Byles, Serjt., with him), to support the rule. —First, there is abundant evidence to shew that the defendant and Warner, the executors, assented to take the property as trustees, and not as executors, by which they would become joint-tenants; and, therefore, a conveyance by Warner alone was not sufficient to pass the property in the title deeds to the plaintiff. The authorities shew, that there is no necessity for an *express* assent by an executor to a legacy bequeathed to him, but it may be implied: Com. Dig. "Administration," C. 6. In *Doe d. Hayes v Sturges* (a) the rule on this subject is thus laid down by Gibbs, C. J.: "The principle established in these, and all the cases cited, is, that if an executor, in his manner of administering the property, does any act which shews that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy; but if his acts are referable to his character of executor, they are not evidence of an assent to the legacy." There is also another

(a) 7 Taunt. 223.

principle, that not only can one executor act alone, to convey the testator's property, but he may do so against the will of his co-executor. But if it turn out that either executor has assented to take the estate devised to them in their character of trustees, the estate vests in them as trustees, and then the principle as to executors ceases to apply. Now, here the estate was devised to Warner and the defendant upon certain trusts, and they ought not to sell the property as executors, unless they were constrained to do it for the purpose of raising funds to satisfy the testator's debts. If there were debts to be satisfied, and no other assets available to pay them, then they must sell as executors; but if not, then it was their duty to do it as trustees. The testator contemplated that he was to have the benefit of their joint judgment. The testator's meaning was, that they were not to act as executors in the sale of the estate, unless there should be an exigency on account of debts. It appears here, that the parties were selling in their character of trustees; and if so, it must be taken that they had assented to take as trustees. It was their duty to sell the property as trustees; and it must be assumed, if there be any ambiguity, that they adopted the right course, and acted consistently with their duty, and not in violation of it. If Warner executed the deed as trustee, it amounts to an assent by him to the bequest to him as trustee; and, after having executed the deed as such, it is impossible for him to say he did not take an interest as trustee. Secondly, this defence is available under these pleadings,—for under one or other of the pleas, it was competent for the defendant to shew that he was tenant in common of the deeds in question, and that the action is not maintainable against him. The declaration in detinue consists of two propositions; the first is, that the plaintiff has such a property in the chattel as will enable him to maintain the action; the second is, that the defendant has refused to deliver up to the plaintiff that which is *his property*. If the defendant traverses both those allegations, he denies the right of action altogether. [*Alderson*, B.—As to the plea of non detinet, the defendant is precluded, by the rule of Hilary Term, 4 Will. IV. from setting up under it anything else than a denial of the detention. There are

negative words to be found in the rule as to detinue, but there are none in the rule as to trover. In the case of detinue, you can only give in evidence under non detinet, that you did not detain. As to the plea of not possessed, there may be some ground for argument. In *Owen v. Knight*,^(a) it was held, that under the plea of not possessed, the defendant might shew that he had a lien on the deed sought to be recovered, because that shewed that the plaintiff was not entitled to the possession of it. But that is a very different case from the present.] The cases as to the plea of not possessed, as applying to a lien, have perhaps no great bearing on the present case. The plea of not possessed means that the plaintiff was not *lawfully* possessed. The averment, that the plaintiff is possessed as of his own property, means that he is possessed in such a manner as entitles him to bring an action against the defendant. [*Alderson, B.*—The facts shew that the plaintiff has such a property in the deeds as will entitle him to maintain an action against a wrong-doer: ought not the defendant, then, to shew the character in which he stands, by pleading it as an answer to his *prima facie* liability?] There is a distinction between real property and personal property, with respect to possession. In the case of real property, the actual possession is a thing distinct from the right of possession; but in the case of personalty the property draws to it the possession. The meaning of “not possessed” here is, that the defendant is owner of the property, in such a way as to be an answer to the action. The cases of *Nicholls v. Bastard*,^(b) *Carnaby v. Wellby*,^(c) and *Gregg v. Wells*,^(d) shew that, as against a mere wrong-doer, the plea of “not possessed” means that the plaintiff had not the actual possession; but if the defendant is an execution creditor, or otherwise claims under a right, then the meaning of the proposition shifts, and lets in the inquiry as to who is entitled to the property. In *Leak v. Loveday*,^(e) which was an action for trover, *Coltman, J.*, says: The meaning of the plea is, that the plaintiff has no property in the goods in question which will entitle him to maintain an action against this defendant.” That applies here; for one tenant

(a) 4 Bing. N. C. 54; 5 Scott, 307. (b) 2 C. M. & R. 659.

(c) 8 Ad. & Ell. 872; 1 P. & D. 98. (d) 10 Ad. & Ell. 90; 2 P. & D. 296.

(e) 2 Dowl. P. C. 633, N. S., 5 Scott, N. R. 923.

in common cannot maintain an action against another. [Lord Abinger, C. B.—What is there said by *Coltman*, J., is intended to meet the case under discussion. *Alderson*, B.—Here you do not seek to shew that the plaintiff has no property in the deeds, but that the defendant has a right to hold them as against him.] The meaning of the rule as to detinue is, that, under non detinet, the defendant shall only contest the fact of a *wrongful* detainer. [*Alderson*, B.—The consequence of holding that the general issue in trover puts in issue the wrongful act, has been to raise all these questions as to whether the detention was lawful. But this is not open to that difficulty, for, in the rule respecting *detinue*, the word “wrongful” is not used. Lord Abinger, C. B.—The plea of non detinet is a denial that the defendant detained as against the plaintiff. Here the defendant does detain the chattel sought to be recovered. All you can say is, that the defendant has the same title as the plaintiff. That ought to be specially pleaded.] The defendant shews that the plaintiff is not the owner of the property so as to maintain the action; because a tenant in common has no right to maintain an action against his co-tenant to recover the possession of the common property. At all events, the proposed defence is available under the plea of not possessed. In *Leak v. Loveday*, it was contended, that it was not competent for the defendants to set up the right of third parties as against the plaintiffs. In that case *Maule*, J., says, “In the case of *Isaac v. Belcher*, *Parke*, B., says ‘The plea, that the plaintiff was not not possessed in this form of action, puts in issue the right of the plaintiff to the possession of the goods as against the defendant at the time of the conversion.’ The meaning of that plea is not to set up the narrow right of the defendant to seize, but to enlarge the defence beyond that, and to put in issue the plaintiff’s right to possession. It was argued in that case, that, there being a plea of not possessed, the defendants being assignees, and claimed the right to the goods in respect of their being in the order and disposition of the bankrupt, they claimed not the actual property vested in them by the fiat, but the right to take and deal with them; and it was said that this could not be set up under not possessed; and *Parke*, B., said,

that the defendants might not only say to the plaintiff, 'You have no right to bring your action of trover at all,' but that they might go on further, and say, 'You have not a property in the goods as against me.'" [Alderson, B.—All the cases you cite are either cases where the plaintiff has no property at all, or no property as against the defendant; but here the plaintiff has an equal right with the defendant.] The plaintiff has some property which will enable him to maintain an action against a stranger, but not against the defendant. If this defence were to be specially pleaded, the plea must state the facts, and, according to the old precedents, should conclude with the special traverse, "without this, that the plaintiff was possessed modo et forma:" *Gilbert v. Parker* (a). And as that would not confess such a property in the plaintiff as would entitle him to maintain this action, it would be bad as being argumentative. It is easy to say that you must plead this specially, but, when you come to look at what the plea would be it amounts to a mere argument. A tenant in common has no right to recover the chattel from his co-tenant, and on that being alleged, it would shew that the plaintiff was not entitled to maintain the action against this defendant. [Alderson, B.—It is laid down in Co. Lit. 283, a., that, under non detinet, "the defendant cannot give in evidence that the goods were pawned to him for money, and that he is not paid; but he may give in evidence a gift, for that proveth he detaineth not the plaintiff's goods."] A party is not put to a special plea, when the result is a simple negative of the property being in the plaintiff so as to enable him to maintain the action.

Andrews and Palmer, contra.—To admit this defence to be given in evidence under the present pleas would defeat the object of the new rules, which was to inform the plaintiff of what he was to come prepare to try. Even before the new rules, this subject-matter of defence ought to have been pleaded by way of confession and avoidance. *Broadbent v. Ledward*, (b) is an authority to shew that one of several tenants in common may bring detinue. *Stancliffe v. Hardwick*, (c) is an express authority in favour of the plaintiff. There, *Parke*, B., says, "But a question still remains as to the meaning of

(a) 5 Mod. 158; 2 Salk. 629.

(b) 11 Ad. & Ell. 209; 3 P. & D. 45.

(c) 2 C. M. & R. 1.

the term 'conversion.' No doubt, however, occurs in this case, for the seizure of the chattel by the defendant, or its subsequent sale, is undoubtedly a conversion by the defendant, and he must, therefore confess and avoid that conversion by pleadings specially the title by which he did it." The present case is distinguishable from *Owen v Knight*,^(a) because there the facts shewed that the plaintiff was not possessed of the indenture, but here he has the right of property.

Cur. adv. vult.

The judgment of the court was now delivered by

ALDERSON, B.—There were no questions in this case, first, whether the defendant established, in fact, the assent of the plaintiff to the legacy mentioned in the testator's will, so as to give a common interest to both plaintiff and defendant in the deeds sought to be recovered in this action of detinue; and the second question was, whether, if this fact could be established, it was competent for the defendant, on these pleadings, to set it up as a defence. Lord *Denman*, at the trial, treated the first of these as a question of law, and in consequence of that my brother *Byles* did not, although he offered to do so, go to the jury upon it. The question depends on a careful and somewhat critical comparison of the terms of a deed with the other circumstances and fact of the case. We think it was properly a question of facts for the jury, and therefore, if we were of opinion that the pleadings made the fact of the common interest of the plaintiff and defendant in the deed material, we should grant a new trial. But we think the second question must be determined in favour of the plaintiff, and, consequently that the verdict must stand. The declaration in this case is a declaration in detinue surtrovers, and states, first, that the plaintiff was lawfully possessed, as of his own property, of certain deeds: that he causally lost them out of his possession; and that they came to the possession of the defendant by finding; and then, that the defendant, well knowing the deeds to be the plaintiff's property, did not deliver them, but unjustly detained them from the plaintiff. The defendant has pleaded, first, *non detinet*; and, secondly, that the plaintiff was not lawfully

(a) 4. Bing. N. C. 54; 5. Scott. 307.

possessed, as of his own property, of the deeds in question. As to the first of these pleas, it is perfectly clear, under the very words of the new rules, and according to the exposition of those words given by this court in the case of *Richards v. Frankum* (a), that it only puts in issue the fact of the detainer of the goods, the subject of the action. This point, indeed, was not much insisted upon in the argument. The only question, therefore, is, whether, under the second plea, it be competent to set up this defence. There is no doubt that, in the action of trover, the Court of Common Pleas, in *Owen v Knight*, (b) has decided, that under the plea of not possessed, the defendant may give in evidence a lien on the ground that this plea denies the plaintiff's right to the immediate possession of the goods, as well as his property in them; and in the case of *White v. Teale*, (c) the Court of Queen's Bench held, on similar grounds, that such a defence was not admissible under not guilty. It is proper to abide by the authority of these decisions in the action of trover, though, no doubt, plausible reasons may be assigned for saying that the proper plea on which such defence as a lien, or the like, may be made, is the plea of not guilty, by which the conversion is denied. But we are of opinion, that in the action of detinue, this plea of not possessed cannot have the same effect. In this form of action, we are not embarrassed with the difficulty which exists in the action of trover founded on a conversion, which is always a wrongful act, and cannot, therefore, be confessed and avoided. The detainer, which alone is in issue under *non detinet*, may be lawful or unlawful, and therefore it may be denied altogether, or it may be admitted and justified as a lawful act; and this we find supported by the older authorities. In Co. Litt. 283, a., it is thus laid down: "In detinue, the defendant pleadeth *non detinet*; (which, under the old mode of pleading, put in issue the plaintiff's property and the detainer); he cannot give in evidence that the goods were pawned to him for money, and that it is not paid, but must plead it; but he may give in evidence a gift from the plaintiff, for that proveth he detaineth not the plaintiff's

(a) 6 M. & W. 420.

(b) 4 Bing. N. C. 54; 5 Scott. 307.

(c) 12 Ad. & Ell. 114; 4 P. & D. 43.

goods; and yet a pledge for money unpaid would clearly negative the plaintiff's right of immediate possession, if that indeed were in issue in detinue under not possessed. But, according to Lord *Coke*, this must be specially pleaded in confession and avoidance of the detainer. In the case of *Isack v. Clarke*,^(a) *Houghton*, J., speaking of detinue, says expressly, "En un detinue pur beins, est bon plea que il eux pledge pur deniers que n'est paie." And *Dod*, J., in the same case, says, "En detinue per charters, defendant dit que le predecessor del'plaintiff ceo pawne a luy pur £5 que vient al use del'mease, at que il est, reddie a deliver les charters, se le plaintiff voilt paier les deniers; et bon plea." For this, he cites 33 Hen. VI. 26 and 27.

The plea of not possessed, we think, on these authorities, puts only the property of the plaintiff in issue; and if, therefore, the plaintiff has such a property as will enable him to maintain detinue, it is enough. Now, in order to maintain detinue, it is not necessary that he should have the entire property in the goods. A plaintiff entitled to a share of a chattel may maintain this action. That was decided by the Queen's Bench in *Broadbent v. Ledward*.^(b) And if the defendant has any right to detain, arising, as in this case, out of a joint interest, or, as in other cases, out of a lien or pledge, we think that he must plead such right specially on the record. We are aware this is contrary to an opinion of the Court of Queen's Bench in the case of *Lane v. Tewson*;^(c) but we cannot agree with that decision. The case was not fully argued before the court, nor were the authorities, which we think have decided that question, fully laid before them.

We think that in this case, the rule for a new trial must be discharged.

Rule discharged.

THORNE v. JENKINS.

12 M. & W. 614.

To debt on bond, conditioned to pay money on demand, the defendant pleaded that no demand had been made before action. Replication, that there had been such a demand, concluding to the country:—Held, that the replication was good.

Debt on bond.—The defendant craved oyer of the condition, which was, that the bond should be void, "if the defendant

(a) 1 Roll. 128.

(b) 11 Ad. & Ell. 209; 3 P. & D. 45.

(c) 12 Ad. & Ell. 116; 1 Gale & D. 584.

should well and truly pay, or cause to be paid, to the plaintiff £170 on demand." Plea, that no demand had been made before the commencement of the suit.

Replication, that there had been such a demand, concluding to the country.

Special demurrer, assigning for cause, that the replication was informal, inasmuch as it did not assign any breach of the condition; and also, that it ought to have concluded with a verification, and not to the country.

Merewether, in support of the demurrer.—The replication is bad. There could be no cause of action until there had been a demand and refusal. The case is similar to that of *Hayman v. Gerrard (a)*, which was an action of debt on bond, conditioned to render an account of all such sums of money and goods as were due and belonged to one William Norrell at the time of his death, which should in any way come to the defendant's hands. The defendant pleaded that no goods or sums of money came to his hands. The plaintiff replied that a silver bowl, which belonged to the said Norrell at the time of his death, came to the hands of the defendant, concluding with a verification; and on demurrer, it was adjudged that the replication was bad for not assigning a breach, viz. that the defendant did not make a dividend or pay the per centage; but that the conclusion, with an averment, was proper. But, in a note at the end of the case, the reporter expresses an opinion that the replication was bad for the conclusion, but well enough for the other point. It must be admitted, however, that that case was held not to be law in *Meredith v. Allen (b)*. [*Parke, B.*—The plea admits and excuses a non-performance, and it is sufficient for the replication to deny that excuse in all cases, except in the case of debt on bond for the non-performance of an award. The defendant says, I am not bound to pay the money, because there is a condition precedent which you have not complied with, namely, the making a demand. The replication negatives that, and properly concludes to the country.] The replication does not say that the defendant did not pay. Might not the defendant have rejoined that he did pay.

PARKE, B.—No; that would be a departure from the plea. The replication is good, and our judgment must be for the plaintiff.

ALDERSON, B., concurred.

Judgment for the plaintiff.

Montague Smith was to have argued for the plaintiff.

(a) 1 Saund. 101.

(b) Carth. 115; 1 Salk. 138.

THE UPPER CANADA JURIST.

COLONIAL DIVORCE.

Public attention has been directed with much interest, to the proceedings which have taken place during the last session of the legislature on the subject of divorce, and as it must be admitted that the law of divorce is one which affects some of our best and dearest interests, and as the power of a colonial assembly to legislate upon it, has been much questioned, we conceive that an inquiry into the principles on which such legislation proceeds in Great Britain, may be beneficially made; as upon their applicability to colonies possessing legislative powers, must depend the propriety and justice of colonial legislation. In all countries laws of divorce afford but a mournful remedy, and in England both the spiritual courts and the legislature interfere with a very unwilling spirit. Every facility is there given to marriage, consistent with a proper performance of the ceremony and the due prevention of fraud; and every attempt to dissolve the sacred tie is looked upon with suspicion and alarm, both from its effects upon the legitimacy of children, and the consequences of that legitimacy being impeached in the eyes of the world. It is in this spirit, that if a party seek to annul a marriage or any of the obligations consequent upon it, every argument is weighed, and every device encouraged, in support of the union, and in bar of its alteration or dissolution. Not only collusion between the parties, but the want of clean hands on the part of the accuser, or forgiveness, express or implied, or even delay in prosecuting legal redress, create in themselves personal disabilities. If the injured husband or wife altogether omit to prosecute the right of divorce, the law never interferes, however flagrant the adultery may be. It is upon the same principle, that divorce is regarded as a mere personal cause of complaint, in which no third individual, and not even the public, has any business to interfere. If the privilege be not claimed by the innocent party, or if it be abandoned before it is fully established, the marriage continues to subsist with all its rights and privileges, its obligations and consequences, undisturbed. The necessity of

providing for the care and education of the young; the fear of affording scope to the selfish passions, and the danger of allowing the least possibility of separate interest to spring up between husband and wife, are unanswerable arguments for encouraging adherence to the contract of marriage, and discouraging its dissolution. From the very nature of man we are obliged to consider that the permanence of the bond of the union between husband and wife, must be calculated upon rather from our weaknesses, than confided in from our virtues. Men are less likely to struggle against the obligation, where they know that they cannot free themselves from it; and the fewer causes that are recognized in a state, as sufficient to serve for the dissolution of the marriage contract, the less likelihood is there of men being dissatisfied with their condition under it. If facilities are given for the severance of the marriage tie, pretexts can always be found to enable the parties to avail themselves of those facilities, and the state of society in the Roman empire, as described by Gibbon in the fifth volume of his history, is a true picture of the consequences that would inevitably ensue: "Passion, interest or caprice, suggested daily motives for the dissolution of marriage: a word, a sign, a message, a letter, the mandate of a freedman, declared the separation: the most tender of human connections was degraded to a transient-society of profit or pleasure. According to the various conditions of life, both sexes alternately felt the disgrace and injury: an inconstant spouse transferred her wealth to a new family, abandoning a numerous perhaps a spurious progeny, to the paternal care and authority of her late husband: a beautiful virgin might be dismissed to the world old, indigent and friendless: but the reluctance of the Romans, when they were pressed to marriage by Augustus, sufficiently marks, that the prevailing institutions were less favourable to the males. A specious theory is confuted by this free and perfect experiment, which demonstrates, that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence, and inflame every trifling dispute; and the minute difference between a husband and a stranger, which might so easily be removed, might still

more easily be forgotten." In Christian communities, the force of religion adds sanctity to the marriage bond. God is called to witness the civil contract and the vow spoken in the face of heaven is the ratification of the agreement made before men. "It is a great mistake," says Lord Stowell in his judgment in Dodson's report of the case of Dalrymple, "to suppose that because marriage is a civil contract, it cannot therefore be a religious one." From its consideration as a religious contract, has arisen the opinion of the indissoluble nature of the tie among many divines, and by the Church of Rome it is regarded as a sacrament, and its inseparable nature is settled and insisted upon by the Council of Trent. *Si quis dixerit ecclesiam errare, cum docuit, et docet se, matrimonii vinculum non posse dissolvi se anathema sit.* But though the Church of Rome pronounces against the dissolution of the marriage tie, it gives to the ecclesiastical judge the power of decreeing a separation between man and wife, as complete as if a divorce were pronounced, in all but the power of marrying again; and surely this destruction of the whole matrimonial relation, is as inconsistent with the religious engagement of the parties to remain united for life, as the laws of the reformed and Greek churches, which allow the engagement to be annulled. "*Separantur*," says the canon law, "*sed remanent conjuges*;" but if they be separated *a mensa et toro*, they are surely almost as much released from each other as if the marriage were annulled. And, if the question be treated as one of expediency, it must be better for the interests of religion and society that the offending party should be punished, and the injured relieved, than that a perpetual separation should be decreed, which must place both on the same footing, and prevent the innocent from ever again entering the marriage contract, which has been forfeited by no fault of theirs. And, as far as the religious part of the contract is concerned, there seems to be no just reason why when the vow solemnly pronounced before God is broken, the crime committed by the perjury should not discharge the innocent party from the obligation, which the civil contract has imposed. The commission of adultery is a direct violation

of the vow; and to sanction the continuance of the marriage against the injured party afterwards, were to punish the innocent and not the guilty. We cannot but disapprove of the laws of those countries which allow a dissolution of the marriage contract upon reasons depending upon the mere will or disposition of the parties; but the law of England proceeds upon no such insufficient grounds. "There can be question," says Lord Stowell in *Proctor v. Proctor* (2 Hagg. Cons. Rep. 296), "that the legal nature of the marriage contract in this country had its entire root in the ancient canon law of Europe; not, indeed, since the reformation, to the full extent of that law, which considered it an absolute sacrament, but to the extent of considering it in such case an act highly spiritual, consecrated by divine authority, and, as such, indissoluble by human power for any cause whatever"; and the same judge adds, in another part of the judgment, "It is notorious that this country, at the reformation, adopted almost the whole law of matrimony, together with all its doctrines of indissolubility, of contracts '*per verba de presenti et per verba de futuro*', of separations '*a mensa et toro*', and many others; the whole of our matrimonial law is, in matter and form, constructed upon it; some canons of our church may have varied it, and a higher authority, that of the legislature, has swept away some of the important parts of it. But the doctrine of indissolubility, remains in full force. The very practice of our legislature, in granting by special acts, particular divorces in particular cases, affirms the indissolubility, as existing in the general law, and to be maintained by the courts in their dispensations of justice." The theory, therefore, of the law of England, is according to the law of Roman Catholic countries; its practice agrees with that of the Reformed and Greek churches; and although in *Foljambe's case* (2 Burn's Eccles. Law, 496), the spiritual court dissolved the marriage, yet since that decision, in the 44th year of the reign of Queen Elizabeth, no other similar decree has been made. The law of England, then, allows separation in three cases, by divorce *a vinculo matrimonii*, *a mensa et toro*, and by the act of the legislature; the two former are obtain-

ed in the spiritual courts, the latter by legislative authority. The first is called a declaration of nullity, or that the marriage never existed in fact, and the grounds upon which it proceeds are common to the codes of all countries, and rest upon fraud, force or fear, so as to invalidate the consent of either party to the union, an existing union of either party undissolved by divorce or death, error regarding the individual or sex, insanity, idiocy, impuberty, and relationship by birth or marriage, which in England cannot be nearer than the fourth degree by the civil law, and of the second by the canon law; the second is the release of the parties from the conjugal duties, or the necessity of living together, but without any severance of the marriage tie; and the third is the complete rupture of that tie, so as to give to each party the right of contracting a second marriage, as if the first had never been solemnized. As in this country we have no ecclesiastical court, it is clear that neither divorce a vinculo, nor a mensa et toro, can be obtained, although in collateral proceedings, in which the question of the legality of a marriage, which might be dissolved in England by a decree a vinculo in the spiritual courts, might come up, the courts here might perhaps look at the position of the parties, as if no form of contract had ever been entered into between them; as for divorce a mensa et toro, as that must be obtained in all cases by proceedings before the court, if compulsion be necessary, it certainly cannot be obtained here; and if such a separation is desired, it can only be by the consent of the parties themselves, and must rest entirely upon their own engagements. The forms or ceremonies which accompany marriage, in any particular state, must depend upon the laws of that state, and are of no force or validity beyond its limits, except as far as they are received in all countries in the world, as a test of the due performance of the contract. But the commune jus gentium, has given to those particular forms and ceremonies the same effect universally, which is granted to the essential requisites of marriage. In *Scrimshire v. Scrimshire*, (2 Hagg. Cons. Rep. 417), the court say, "From the infinite mischief that must necessarily arise to the subjects of all nations, with respect to legitimacy,

succession and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, it has become *jus gentium*, that is, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries: that is, the law where the contract is made. By the observance of this law, no inconvenience can arise, but infinite mischief will ensue from its neglect. If countries do not take notice of the laws of each other, with respect to marriages, what would be the consequence, if two *English* persons should marry clandestinely in *England*, and that should not be deemed a marriage in *France*? might not either of them, or both, go into *France* and marry again, because by the *French* law, such a marriage is not good? and what would be the confusion in such a case! Or again: suppose two *French* subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage, undoubtedly the wife, though *French*, would be entitled to all the rights of a wife by our law; but if no faith should be given to that sentence in *France*, and the marriage should be declared null, because the man was not domiciled, he might take a second wife in *France*, and that wife would be entitled to legal rights there; and the children would be bastards in one country, and legitimate in the other." All marriages, therefore, which are contracted in any foreign country, according to the laws of that country, are valid in England, however repugnant to the genius and policy of her institutions; unless, indeed, such marriages in any way violate morality or religion, by sanctioning polygamy or incest. But there are also, in England, many forms and ceremonies connected with the contract of marriage, which are enjoined by acts of parliament, and their non observance may frequently render the marriage null and void; and many of these forms and ceremonies are required in this country. The more the contract of marriage is guarded by ceremonies, introduced to prevent the unwary

of either sex from being made the dupes of profligates and knaves, the greater opportunity it may be said, in another sense, is given to the perpetration of villany and fraud, inasmuch as it is easy to imitate forms, and by ostentatiously putting forth a pretended compliance with them, to accomplish at once the double purpose of putting the innocent off their guard, and of invalidating the rite. But Lord Stowell has observed in *Hawke v. Corri*, (2 Hagg. Cons. Rep. 289,) speaking of a wedding, at which it was supposed a false license had been used, "It seems to be a generally accredited opinion, that if a marriage is had by the ministration of a person in the church, who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties, who come to be married, are not expected to ask for a sight of a minister's letters of orders; and if they saw them, would not be expected to inquire into their authenticity, The same favorable principle might not unjustly be applied on behalf of an innocent young woman, to this ostensible minister, though officiating in a private house, where the office is authorized, by the special license, to be performed with the same validity as in a church. And even if the license were false, it might perhaps be considered by some as likewise an arguable point, whether the same principle, which in favour of innocent parties, supports the acts of a pretended clergyman, might not be invoked to uphold the authority of a suppositious instrument of license, obtruded upon a party deceived by so cruel a fraud; for it can as little be expected that a young woman should ascertain the authenticity of the instrument under which her marriage is to pass, as the ordination of the minister who is to pass it. Upon such points I give no further opinion, than by saying that the court would listen, without impatience, to any argument (whether successful or not), which had for its object, to protect an innocent young woman from the effects of so detestable a fraud." In England, then, the contract of marriage having been once legally entered into, can only be dissolved in the life-time of the parties, by the act of the legislature, and the legislature never interferes to annul the contract, unless in cases of adultery. On the presentation of a petition for

leave to introduce a bill of divorce, (which usually originates in the House of Lords), an official copy of a separation *a mensa et toro*, must be delivered at the bar of the house on oath. Upon the second reading of the bill, the petitioner must attend at the house to be examined touching any collusion with the other party. When the bill reaches the commons, evidence of the petitioner having obtained judgment in an action for damages, must be given in committee, or a sufficient reason shown why such action has never been brought, or has failed. About the year 1810, an order was made in the House of Lords, that a clause should be inserted in all bills of divorce, to prohibit the marriage of the adulterer with the adulteress : which is the rule of the civil law. But the order was only enforced in one instance, where the parties were within the prohibited degrees ; a clause is usually inserted in the bill, expressly enabling the petitioner to marry again ; but though silence is preserved respecting the other party, this does not preclude the legality of that party's marrying with the associate in guilt, or with any one else. Such are the principles upon which bills of divorce are entertained in the Parliament of the United Kingdom. The Legislature of Canada is empowered by the Imperial Act giving Canada a constitution, to make laws for the peace, welfare, and good government of the province, not repugnant to the provisions of that act, or of any act of the Imperial Parliament, by express reference or necessary intendment applicable to the province. There is nothing, therefore, in the Constitutional Act, to prevent the legislature of this province, from entertaining bills for divorce for adultery, and acting upon the same principles in passing laws for the dissolution of the marriage contract, that would be acted upon in England. The legislature of Upper Canada passed a divorce bill, and after being reserved for the royal assent, it ultimately became law, and there are certainly no less powers in the legislature of United Canada, than there were in the legislature of Upper Canada, before the union of the provinces. If the colonial legislature were to assume the power of dissolving the marriage tie for other causes than adultery, there can be little doubt that the law officers of the crown in England, would advise that the royal assent should

be withheld from such bills, for no other reason, than to prevent the conflict that would necessarily arise between the Imperial and Colonial laws, upon a subject, respecting which, both proposed to act upon the same principles. Too many difficulties have arisen out of the difference in the methods of obtaining divorce in England and Scotland, to allow us to desire that divorce should be granted in the colonies for any other cause than adultery. In Scotland the courts have the power of granting an absolute separation of the marriage tie, a power that is exercised in cases of desertion as well as of adultery; and it is no uncommon course for parties to resort to Scotland merely to obtain a divorce with less delay and expense than must necessarily be incurred by their prosecuting their remedy in their own country, or to obtain it for reasons which, in England, would be held insufficient to entitle them to the redress they sought. In Lolly's case, Russ. and Ry. 237, an Englishman by birth and domicile, after procuring a divorce of this kind from the courts of Scotland, married again in England, and was indicted and punished for bigamy. The law of this case is not altogether acquiesced in, but we are not aware that it has ever been overruled, although it has been severely commented on by Lord Brougham, and we see that there is thus a conflict produced between the laws of two neighbouring countries, the evils of which, in their worst and most aggravated form, cannot fail injuriously to affect the people of the whole British Empire; evils, which cannot be made to injure us, so long as the legislature confine the remedy of divorce, to the cases in which it is applied for in consequence of the commission of adultery.

LAW AND FACT.

The well known elementary rule "*ad questionem juris respondent judices ad questionem facti respondent juratores*" very clearly defines the provinces of the court and of the jury. However intimately connected questions of law and fact may be by legal definition or allegation, although the terms of the issue to be tried involve both, yet upon the trial, the dis-

inction is usually made without confusion or difficulty; the power and duty of the jury being confined and invited wholly to the question of fact, and their decisions being expressed, either simply by means of a special verdict, to which the court afterwards applies the law in giving judgment, or being embodied in a general verdict; in which case, although such verdict comprise matter of law, as well as matter of fact, as where they find a defendant guilty of a conversion, or a criminal guilty of theft, their office is still confined merely to the facts. In delivering a verdict which contains matter of law, they act only according to the direction of the court, that the facts if proved, constitute a conversion in law in the one case, or a larceny in the other. So far, the application of the general rule is plain and clear; nor could it be well otherwise, so long as the functions of a jury are confined to the finding of mere facts, as distinguished from such conclusions as will presently be noticed. Doubts which arise whether a particular question be one of law or fact, as contradistinguished from each other, seem to concern only such general conclusions from facts as are essential to a conclusion in law, but which do not themselves depend upon the application of any rule of law. It will be proper to premise a few remarks upon the origin of such questions. The administration of the law consists in annexing defined legal consequences to defined facts. The facts so defined must be expressed in terms of known popular meaning, or be capable of translation into such terms by virtue of legal interpretation. If technical expressions were not so convertible into ordinary language, they could not be explained to a jury so as to enable them to apply those expressions, and embody them in a general verdict; nor could the court, a special verdict being found by a jury, detailing facts, in ordinary popular terms, determine their legal value. But where facts are numerous and complicated, the law cannot be defined by an enumeration of particular and minute facts and circumstances, but yet may be capable of sufficient definition by means of conclusions drawn from facts, however complicated they may be. Thus the right may be made to depend on the question or conclusion, whether an act has been done in

reasonable time, whether due and reasonable caution has been used, or due and reasonable diligence exerted; for such questions or conclusions, although not the subject of testimony by eye or ear witnesses, are capable of ascertainment, in a popular sense, by the aid of experience and knowledge of ordinary human affairs. One consideration then presents itself, how these questions stand in relation to the general elementary rule concerning questions of law and fact; whether all such conclusions are to be referred either to the judge or to the jury; and if not exclusively to either, how the distinction is to be determined. Such questions seem to be properly questions or conclusions in fact; they are conclusions or judgments concerning mere facts, founded by the aid of sound discretion upon experience and knowledge of the ordinary affairs of life, and of what is usual or probable in the course of those affairs. Such conclusions are formed, and the relations which they determine exist, independently and without the aid or application of any rule of law. What is reasonable or unreasonable, usual or unusual, diligent or negligent, probable or improbable is the same, be the legal consequences annexed what they may; such consequences may be altered at the will of the legislature, while those conclusions and relations remain unchangeable. A conclusion or judgement in law always involves the application of some rule of law, that is, the annexation of some legal artificial consequence to an ascertained state of facts; but those now under consideration are wholly independent of any legal rule or definition; the very absence of any such rule or definition constitutes the necessity for resorting to them; for when the law defines what is reasonable, diligent or probable, the conclusion by any other rule, or according to any other mode of judging, is immaterial. In the absence of any such rule the conclusion, so far from being founded on any legal rule or judgment, is one of the foundations on which the legal conclusion is built. When, therefore, conclusions concerning facts, but which are essential to a legal judgment, are expressed in popular terms, the sense of which is not controlled or restricted by any legal rule or authority, they must, it seems, be regarded as conclusions in fact. And where such terms are used, but are to a limited and partial extent restricted

by technical rules, they must of course, to the extent to which they are so limited, be questions of law; but beyond those limits, must still be understood in their natural and ordinary sense as conclusions in fact. And therefore, when a doubt arises in any such case, whether the question or conclusion be one of fact or law, the real question seems to be, whether there exists any rule or principle of law which controls or limits the plain or natural import of the terms, and so converts what is apparently a question of fact for the jury, into a question of law to be governed by the technical rule. It may not perhaps be deemed irrelevant in this place to observe, that the same reason does not exist for abstracting matters of fact from the decision of the judge, which applies to the exclusion of a jury from the decision of matters of law; the latter rule is properly founded on the presumed incapacity of jurors so to decide. Judges, on the contrary, are qualified in an eminent degree, to decide on matters of fact; in consequence of their knowledge and experience in ordinary affairs arising from forensic habits and long practice. At present, however, the question is not whether the general elementary rule be founded in consummate wisdom, but as to the proper application of the rule, consistently with its principle; and however desirable it might possibly be to refer to the judge, and not to the jury, those conclusions which seem to us to be mere conclusions in fact, the advantage cannot be attained without violating the general elementary rule in one branch, when in the other, which confines the decision of matters of law to the judgment of the court, it seems to have been inflexibly applied. The construction of all acts of parliament, of all written instruments which possess any artificial or legal force or authority, and which do not operate simply as mere evidence, tending to the proof of a fact, belongs undoubtedly to the court. The inspection of all records, and of all matters determinable by such inspection, is also a matter peculiar to the decision of the court. It falls also within the province of the court to decide, in all litigated cases, whether the particular facts alleged in order to establish a claim or charge, are sufficient to satisfy the general terms or requisites of the law on which the right or liability depends. So it is for the court in all cases to

decide on questions of variance, and to determine whether the facts which are proved, or which the evidence tends to prove, satisfy the averments on the record, and which are put in issue by the pleadings. So it is a well established rule, that questions occurring collaterally in the course of a trial, are determinable by the court, although they involve questions of fact. For, as has been already intimated, even an encroachment on the elementary rule, in referring matter of fact to the decision of the court, when it is essential to a decision in fact, is not so much open to objection, as an enlargement of the functions of the jury, in referring any question of law to them, would be; the ordinary exclusion of the former being founded principally on considerations of legal economy and convenience, not on incapacity. Thus, all questions as to the competency of witnesses, the reception of secondary evidence of the contents of a written instrument on proof of the loss of the original, of evidence of a declaration made by a party *in extremis*, are to be decided by the court, and not by the jury. The last of these instances involves the consideration of a simple fact, of a nature peculiarly fit for the consideration of a jury—the belief of the declarant that his dissolution was impending. This, however, and such other facts as are usually for the decision of the courts, in order to warrant their interlocutory judgments, are generally so simple as regards proof, and in their own nature so little subject to conflict, that they form no material exceptions to the general rule. The numerous decisions upon the question of reasonable time, accord mainly with the general elementary rule, and with the positions above advanced; in the absence of any special rule applicable to particular cases, the conclusion is one of mere fact, to be made by a jury. The law cannot prescribe in general, what shall be a reasonable time, by any defined combination of facts; so much must the question depend upon the situation of the parties, and the minute circumstances peculiar to individual cases, which from their multitude and variety, are incapable of such a selection as is essential to a precise and particular law. If a man has a right by contract to cut and take crops from the land of another, it is obvious that the law can lay down no rule as to the precise time when they shall be cut

down and removed : all that can be done is, to direct or imply that this is to be done in a reasonable and convenient time ; and this must necessarily depend on the state of the weather and other circumstances, which cannot, from their nature and multiplicity, form the basis of any legal rule or definition. The question as to reasonable time was much considered in the case of *Eaton v. Southby*, Willes, 131. The plaintiff in replevin pleaded to an avowry, justifying the taking of goods as a distress for rent in arrear, that he took the growing crops in execution, and afterwards cut the wheat, and let the same lie on the premises, until the same, in the course of husbandry, was fit to be carried away ; and that the defendant distrained the same before it was fit to be carried away. It was objected by the defendant on demurrer to this plea, that the plaintiff ought to have set forth how long the corn lay on the land after it was cut, that the court might see whether it was a reasonable time or not. But the court decided that the objection was untenable : for though in *Co. Lit.* 56, b., it is said that in some cases the court must judge whether a thing be reasonable or not, as in case of a reasonable fine, a reasonable notice or the like, it would be absurd to say that the court must so judge in a case like the present ; for if so, it ought to have been stated in the plea, not only how long the corn lay on the ground, but what weather it was during that time, and many other incidents which it would be ridiculous to insert in a plea. And the court was of opinion that the matter was sufficiently averred, and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been proper judges of it. In *Bell v. Wardell*, Willes, 202, the defendant pleaded in justification to a declaration in trespass, a custom for the inhabitants of a town to walk or ride over a close of arable land at all *seasonable* times ; the plaintiff replied *de injuria*, and the defendant demurred. The court held that seasonable time was partly a question of fact, and partly a question of law ; and that as the custom was laid, if it were not a seasonable time, the justification was not within the custom ; and that though the court may be the proper judges of this, yet, in many cases, it

may be proper to join issue upon it, that is, in such cases where it does not sufficiently appear on the pleadings whether it were a seasonable time or not. Before a precise and definite rule had been established on the subject, it was held that the question as to reasonable notice of the dishonour of a bill of exchange, was one of fact for the consideration of a jury. And in *Fry v. Hill*, 7 Taunt. 397, it was held, that where no established rule of law prevails, the question whether a party has been guilty of laches in not presenting a bill payable at sight, or a certain time after, was a question for the jury. So likewise, whether tithes have been removed within a reasonable time.—*Facey v. Hurdom*, 3 B. & C. 213. And the same point in the removal of a distress.—*Pitt v. Shew*, 4 B. & A. 206. And although the question whether a particular covenant was an usual covenant in a lease, might at first view seem to be of a legal character, yet it has been held to be one proper for determination by a jury.—*Doe v. Sandham*, 1 T. R. 705. Upon inquiries concerning homicide, where the question arises whether the party charged used due and reasonable care to prevent mischief, it is ordinarily one for the decision of the jury.—*Frost* 264, 265. There are numerous decisions and dicta to the effect that reasonable time *may* be a question of law, and that it *is* a question of law in all cases where any such rule has been laid down, and perhaps also in all cases where a rule warranted in legal principle *can* be laid down. The former general position is so notorious, that the instances require no particular attention; it being clear in principle, as has been already observed, that expressions of known popular meaning used in the definition of a right or liability, must *prima facie* be understood in that sense; and that whenever that meaning is controlled by a legal rule, which either alters or limits the sense, or renders the case an absolute or peremptory exemption to the general elementary rule, defining the provinces of the court and jury, the technical rule must prevail. Questions as to reasonable times, customs and services, have frequently been held to be for the decision of the court. “*Quam longum (tempus) esse dedet non definitur in jure, sed pendet ex discretione judiciariorum*” and this being said of time, the like, says Lord Coke, may be

said of things uncertain, which ought to be reasonable; for nothing that is contrary to reason is consonant to law.—Co. Lit. 56, b. A reasonable time for countermanding a writ was held to be a question of law.—1 B. & P. 388. In many instances, where no doubt could exist upon the question of reasonable time, whether it were to be referred to one tribunal or another, the courts have, of their own authority, decided the question; there being in truth no such doubt as to justify the trouble and expense of a trial by the country, and the merits being so clearly in favour of the determination one way, that a finding by a jury on the other, would have seemed to be extravagant. Power having been given to the lessor's son, to take a house to himself on coming of age, it was held that he was bound to make his election within a reasonable time; that a week or a fortnight was reasonable; a year, unreasonable.—Doe v. Smith, 2 T. R. 436. The court held on demurrer to a plea justifying an imprisonment on suspicion of felony, that the detention of the prisoner for three days, to give the prosecutor an opportunity for collecting witnesses, was an unreasonable time.—Wright v. Court, 4 B. & C. 596. In Stodden v. Harvey, Cro. Jac. 204, six days were held to be a reasonable time for removing the goods of a lessor by his executors after his death. In Hunt v. Royal Exchange Assurance Company, 5 M. & S. 47, five days were held to be too long after intelligence of the loss, before notice of abandonment was given. The terms negligence and gross negligence, are terms of popular import, and involve conclusions drawn from conduct and circumstances which ordinarily are mere conclusions in fact, being independant of the application of any rule of law. The question of negligence is therefore one which is usually left to the jury; but the question may be one of law, and is so where the case falls within any settled rule or principle of law; and where no such rule or principle is applicable, the conclusion seems to be one of mere fact. A medical practitioner is bound to exercise a reasonable and competent degree of art and skill; and in an action against such a person by a patient, for damages arising from improper treatment, it is for the jury to decide whether the injury is attributable to the want of that degree of skill.—

Lanphier v. Phipos, 8 C. & P. 475. In an action against an attorney, for negligence in the conduct of a cause, it is a question for the jury, whether the defendant has used reasonable care ; and it was so left to them by Abbot, C. J., in Reece v. Rigby, 4 B. & A. 202. This, it is observable, is a strong instance of the extent to which such questions are to be regarded as questions of fact. A question as to the conduct of a cause by a legal practitioner, might at first-sight appear to be rather a matter for legal consideration than a question for "lay gens." Where the master of a vessel filled the boiler of a steam-engine with water, at night, in winter, and a frost ensuing the water was frozen, and a pipe burst, and the water, in consequence, escaped and did damage ; it was held, that the jury were warranted in finding that the loss was occasioned by the negligence of the master, and not by the act of God.—Siordet v. Hall. 4 Bing. 607. In an action by a merchant, against his agent for negligence in not insuring goods, Lord Mansfield directed the jury generally, that if they thought there was gross negligence, or that the defendant had acted *mala fide*, they should find for the plaintiff : otherwise, for the defendant.—Moore v. Mourgûe, Cowp. 479. But conclusions of this description, like all other general conclusions, may be governed by rules and principles so far as they extend. If mice eat the cargo, and thereby occasion no small damage to the merchant, the master must make good the loss, because he is guilty of a fault ; yet if he had cats on board, he shall be excused.—Abbot on Shipping, 241. Wherever any promise, duty or course of conduct whether express or implied is prescribed by law, the mere omission to perform it, must in point of law, amount to negligence, without any conclusion of negligence in fact. Whether particular acts or conduct occasion nuisance or hurt to another, is also an ordinary conclusion of fact, independently of any law which gives a remedy for, or punishes the author of, such nuisance or hurt. And in this popular sense these terms are usually to be understood, where essential, by definition or otherwise, to a legal claim or liability without any legal restraint or limitation. But if a new market be erected near to that is, within twenty miles of a pre-existing legal market,

and be held on the same day, the conclusion that the former is to the nuisance of the latter, has been deemed to be a mere conclusion or inference of law. But it may be within that limit, and yet not necessarily be a nuisance ; “ *et poterit esse vicinum et infra predictos terminos et non injuriosum.* ”—Com. Dig. Market, c. 3. It is, in such a case, a question for the jury, whether the new market be to the nuisance or detriment of the owner of the pre-existing market or not. But if the new market were erected beyond the limit of twenty miles, the law would not infer that it was a nuisance, though held on the same day. We shall hereafter examine the general rule as applicable to questions of malice and probable cause.

THE TESTATUM WRIT ACT.

This act is considered, by most of the profession residing in the country, to have made an exceedingly beneficial alteration in the law; as they will be enabled, by its provisions, to retain in their own pockets, a large portion of the fees which they have been yearly paying to their agents in Toronto; and may hope to have their proceedings very much facilitated by its provisions. There can be no doubt, that the mere filing the *præcipe* for the testatum writ, and issuing the writ thereon, can just as well be performed by the attorney in the country, as by his agent in town, and therefore we can see no objection to the first clause of the act; but we think that it would have been much better, and more convenient for the profession, as well as much more advantageous for the public, to have carried on all the subsequent proceedings at Toronto, as heretofore. The first and second clauses of the act provide :

1. That it shall and may be lawful for the clerk of the crown, from time to time, and he is hereby required, to supply his deputies in each and every district of Upper Canada, with the original and *testatum* writs of *mesne* and final process, excepting writs against lands and tenements and that the same shall and may be issued by such deputies in any district, in the same manner as may be done in the principal office at Toronto.

2. That the notice on the copy of *mesne* process to be served on a defendant or defendants, shall be in the form already by law provided; and that all proceedings upon any suit so instituted in any district, shall be continued and carried

on in such district, to final judgment: Provided always, that the service of papers shall be made upon the defendant or defendants, or if he or they appear by attorney, then upon such attorney, *at his office*, in the usual mode, or upon his agent at Toronto, according to the existing practice of the Court of Queen's Bench: Provided always, that the Court of Queen's Bench, or any judge thereof, in chambers, on making an order to change the *venue* in any suit, may order the papers in such suit to be transmitted to and filed in the office of the clerk of the crown, at Toronto.

It will be observed, that the second clause is not confined to suits commenced in an outer district, by testatum writ, but applies to *all* suits; and will have the effect of entirely doing away with the rule of court, Mich. Term, 4 Geo. IV.: "Where the attorney, in any cause depending in this court, resides without the district where the action is brought, all notices and demands, and other papers or pleadings, to be served on such attorney, shall be deemed regular by being put up in the crown office in the district wherein such action is brought, unless such attorney have a known agent in the same district; in which case, service on the agent shall be required." By the operation in this clause, where the defendant resides in the district where the action is commenced, and appears by an attorney in another district, all proceedings in the suit must be served either upon that attorney *at his office*, or upon his agent in Toronto; but cannot be served by affixing in the crown office in the outer district, as they might have been under the rule of court. In nine cases out of ten, where the defendant appears to a testatum writ by an attorney of another district, the papers in the cause will be served upon the town agent, and if he wishes to be satisfied of the regularity of the proceedings, he must send to the office in the outer district, and experience great delay and trouble in procuring the necessary information. The object principally desired by the country practitioner would have been gained, if the deputy clerks of the crown had been empowered to issue testatum writs, the appearance of the defendant, and all the subsequent proceeding in the cause, being filed in the principal office; and no confusion would then have taken place, nor would the difference in outlay to agent, which would hardly ever have

exceeded five shillings in an ordinary suit, be considered of any importance, in comparison with the delays and difficulties which it will soon be found will be attendant upon the new form of proceeding.

3. It shall and may be lawful, for such deputy clerk of the crown in each district, to tax the costs, and enter final judgment in all suits commenced within such district where a *cognovit* shall have been executed, and also in the cases of *non. pros.*, and where judgment shall be final in the first instance; and to issue an original or *testatum* writ of *feri facias*, or *capias ad satisfaciendum*, according to the practice of the Court of Queen's Bench: Provided always, that it shall be lawful for either party, in any suit, to sue out a rule from the principal office at Toronto, for the taxation of costs in such said suits by the master.

The first difficulty that appears in this clause, seems to arise from the words "within such district, *where* a *cognovit* shall have been executed"; and must turn upon the construction put upon the word, "where," whether it shall apply to place, or be read "in case." If it should be held to apply to place, then both the commencing the suit, and the giving the *cognovit*, must happen in the same district; and the defendant, who desires to save costs, be driven to make a journey, perhaps from one end of the province to the other, to effect that object instead of being allowed to confess the action, as formerly, in the district where he resided, and have his confession transmitted to the plaintiff's attorney. He must now, too, be put to the additional expense of a suit, as a confession cannot be taken, and judgment entered upon it, in an outer district, until after "suit commenced;" whereas, as the law stood before, no suit was necessary. But the greatest difficulty springs from the proviso: it shall be lawful for either party "to sue out a rule from the principal office at Toronto, for the taxation of costs in such said suits by the master." But who ever heard of such a rule? How is it to be obtained, and what is to be its effect? The master can grant a rule to be present at taxation, but this is to be a rule of a different nature; but whether side bar, or without counsel's signature, or only by judge's order, is left entirely to conjecture. But if it be issued, is the service of a copy to stay the entry of judgment,

until the costs are taxed, or cause the transmission of all the papers to Toronto for the entry of judgment there, or may the plaintiff enter his judgment in the outer office, if he chooses to forego his costs? All these are nice questions, and may require another statute to be passed, to settle them satisfactorily.

4. The deputy clerk of the crown, in each district, shall transmit to the office of the clerk of the crown, at Toronto, all judgments by him entered, and the papers thereto belonging, immediately after entering the same; and upon receipt thereof, such judgments shall be entered of record, and docketted in the principal office.

5. It shall and may be lawful for the clerk of the crown at Toronto, in all cases pending in the said court, where papers are transmitted to him without any charge thereon, to receive and file all such papers in the same manner as if the same had been taken to the said office by the attorney or agent of the attorney requiring the same to be filed.

6. All alias and subsequent writs of final process, and all writs against lands, shall be sued out in the office of the clerk of the crown at Toronto.

7. The office of such deputy clerk of the crown in each district, shall be held in the court-house of each district, if room shall be provided for the same therein; and such deputy shall not be a practising attorney, or an articled clerk to any practising attorney.

8. In all cases where a writ shall have been sued out of the office of any deputy clerk of the crown, for any district east of the Home District, into any district westward thereof, or from such deputy in any district west of the Home District into a district eastward thereof, the time for filing an appearance, and for pleading, replying and rejoining therein, shall be extended to twelve days, any existing provision to the contrary notwithstanding.

The second clause of the act gives the form of notice to appear under the King's Bench Act, which is within *eight* days after the return of the process; this clause, we suppose, is intended to extend the time to twelve days after the return day; but as the act is silent as to the time from which the twelve days are to commence, we are left to conjecture this, in the same manner as we are to conjecture that the extended time allowed for pleading, replying and rejoining, means after demand made, in the several instances.

9. It shall and may be lawful, for each and every such deputy clerk of the crown, to issue rules upon the sheriff, coroners, or elisors of his district, for the return of any mesne or final process.

This clause gives power to the deputy clerk of the crown, to issue the rule, but does not authorize the sheriff, &c., to return the writ to his office ; the return must be made to the crown office, at Toronto, as formerly.

CASES IN THE ENGLISH COURTS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(Present, Lord BROUGHAM, Lord LANGDALE, the MASTER of the ROLLS, Vice-Chancellor Sir JAS. KNIGHT BRUCE, the Right Hon. Dr. LUSHINGTON, and the Right Hon. Mr. PEMBERTON LEIGH.)

JOHN COUNTER, Appellant, v. JOHN MCPHERSON, SAMUEL CRANE, and ALEXANDER FERGUSON, Respondents.

Where appellant had entered into a contract to demise certain premises for a term to the respondents, and previously to the commencement of the term to repair the old premises and build a new warehouse ; and the respondents entered accordingly at the day agreed upon, but before the appellant had completed the building and repairs, and before the lease was executed, and a fire soon after destroyed the premises : Held, that the respondents were not bound to execute a lease and rebuild the destroyed premises, the appellant not having completed his contract, and that till such completion the premises were at his risk.(a)

This was an appeal from a decree of the Executive Council of the province of Canada, bearing date the 20th day of February 1843, whereby the decree of the Court of Chancery for the province of Upper Canada, pronounced by the Vice-Chancellor, and bearing date the 9th day of December, 1841, was reversed, and the bill of complaint of the present appellant was dismissed with costs. The object of the suit, which was instituted by the present appellant on the 27th day of July, 1840, was the specific performance of an alleged agreement entered into between him and the present respondents for a lease, to be granted by him to the respondents for five years, from the 1st of April, 1840, of a wharf and warehouses in the town of Kingston, which after the first of April, 1840, but before the appellant had duly performed the agreement on his part, were destroyed by accidental fire. By the agreement,

(a) As to the decisions at law on this subject, see the case of Walton v. Waterhouse (2 Wms. Saund. 421, and the notes).

which appears to have been only partially reduced into writing, the appellant was under an obligation to erect, according to a plan agreed upon, a new warehouse upon part of the ground to be demised, and to put the old stores or warehouses into repair, and the amount of the rent was to be determined with reference to the amount of the appellant's expenditure in erecting the new warehouse. One of the principal grounds of the resistance, on the part of the respondents, to a specific performance of the agreement insisted on by the appellant was, that at the time of the fire the appellant had not completed the building and repairs, which, according to the alleged agreement, he had agreed to execute; and was not therefore in a condition to call upon the respondents to accept a lease, or to execute a counterpart, containing the usual covenants to repair, and for payment of rent. The agreement was contained in a series of letters between the appellant and respondents. The counsel for the appellant were *Bethel* and *Shabeen*; for the respondents, *Kindersley*, *G. Turner*, and *E. J. Lloyd*. The case was some time ago argued at a great length on both sides; and the judgment of the Lords of the Privy Council was delivered on Monday last by Mr. PEMBERTON LEIGH. As the judgment, which is of great length, contains a review and history of the whole case, and of the arguments on each side, the judgment only is reported.

JUDGMENT.

In this case a bill was filed by the appellant in the Court of Chancery in Canada, seeking the specific performance of an agreement entered into by the respondents. The Vice-Chancellor made a decree in favor of the plaintiff. From this decision the respondents appealed to the Governor-General in Council, who reversed the decision of the Vice-Chancellor, and dismissed the plaintiff's bill, with costs. From this order the present appeal is brought. The terms of the agreement between the parties are to be collected from a correspondence which began in the month of August, 1839, and terminated on the 3rd of January, 1840. That these letters constitute a valid agreement is not disputed by the respondents, although it has been contended on their behalf at the bar that the contract is one with respect to which a

court of equity ought not to interfere, and that the parties should be left to their legal rights and remedies. The case appears to be this :—The appellant was the owner of a wharf and three stores at Kingston, in Upper Canada. Upon part of the property the appellant carried on what is called a “forwarding business.” One of the stores was in the occupation of a Mr. Jackson, and another in the possession of the respondents, under a sub-contract with a public company, who had taken a lease from the appellant, and whose interest would expire on the 1st of April, 1840. In this state of circumstances, the respondents entered into a negotiation for a lease of the whole of the premises for a term of five years from the 1st of April, 1840. After much discussion, it was finally agreed between the appellant and respondents, that the appellant should put in order the existing stores, and should build a new store, or warehouse, according to a plan referred to in the correspondence, but not proved in the cause; that these works should be completed by the 1st of April, 1840, and that the respondents should then take a lease for the term of five years from that day, at a rent of 250*l.* per annum, if the sum expended by the appellant in the erection of the new buildings should not exceed 600*l.*; and if the sum so expended should exceed 600*l.*, then at an additional rent, calculated at the rate of 12 per cent. upon the excess. Possession of the whole of the property was to be delivered to the respondents on the 1st of April, 1840, and they were to engage to restore the premises at the end of the term in as good a condition as that in which they were when possession was taken. It appears, also, that the appellant was to relinquish his “forwarding business” in favor of the respondents. In pursuance of this arrangement, the building of the new warehouse was commenced, but when the 1st of April arrived, it is admitted on all hands, that the warehouse was far from being completed, and the evidence shews, in our opinion, that the necessary repairs to the old buildings had not been done; and as to part of these buildings had not been commenced. No complaint, however, or at all events no objection to the completion of the contract, was made on that ground by the respondents, and if time was of the essence of the contract, we have

no doubt that all right of objection on that score was waived by them. They continued in possession of that part of the premises which they previously held, which, but for the contract, they should have given up on the 1st of April, and the works in progress were continued with their approbation. In this state of things, on the 1st of April, 1840, the rights of the parties stood thus. The appellant was bound by his contract to perform his agreement by putting the old stores in order, and completing the new building in reasonable time; and upon this being done, the respondents were bound to accept a lease according to their agreement. But they could not be required to accept a lease until the works were done, nor could the rent until that time, be ascertained. If the appellant refused to perform the works, or neglected to do so within a reasonable time after notice, the respondents would be at liberty to put an end to the agreement. The obligation on the defendants to accept the lease was conditional on the appellant's putting the premises into the state in which he had contracted to demise them to the respondents. The waiver of the respondents extended not to the works being done, but only to the time within which they were to be completed. After the 1st of April the appellant accordingly continued the works which had been begun, and commenced repairs upon the old buildings; but while the works were in progress an accident occurred which has given rise to the present litigation. On the 18th of April, 1840, a fire broke out upon the premises, which destroyed or materially injured all the stores. The appellant insisted that the respondents, at their own expense, should rebuild and restore what had been destroyed or injured, and accept a lease on the terms of their agreement. This the respondents refused to do, and on the 27th of July, 1840, the present bill was filed. It is material to attend to the allegations of the bill, and the relief sought by it, in order to understand the real nature of the question, and of the only question which it raised. After stating the correspondence and some other matter with respect to which there is no dispute between the parties, it alleged that "the respondents, in the month of April, 1840, entered into possession of the premises, and continued in possession up to the time of filing

the bill." It stated that, "in the same month of April, part of the premises were destroyed by fire, and other parts materially injured thereby, and that the appellant had applied to the respondents specifically to perform their agreement, and to accept a lease upon the terms of such agreement, and to rebuild and repair the said premises accordingly," which they refused. After some charges, not material to the present purpose, the bill charged, "that the said warehouse was erected and fit for occupation, on the 1st day of April, or within a few days thereafter, and that the respondents had actually taken possession of the said warehouse for many days before the same was burnt down and destroyed, and had actually caused the inside thereof to be boarded up or lined for the reception of wheat in bulk, and had erected, or were erecting, machinery to convey wheat in bulk to the upper stories, whereby the appellant was prevented from completing the said warehouse. And the bill charged that the respondents received goods as custom-house warehousemen after the 1st of April, 1840, and deposited the same in the said warehouse and also deposited therein a considerable quantity of flour, and not less than 4,000, 3,000, or 2,000 barrels, and accepted, took and retained the possession of the key of the said warehouse." These allegations, though not perhaps in all respects quite consistent with each other, appear to amount to this, that previously to the fire, the appellant had substantially performed his agreement, by erecting and making fit for occupation the new warehouse; and the bill accordingly contained no suggestion of anything remaining to be done in that respect by him. The prayer of the bill was, that the said agreement might be specifically performed and carried into execution, and that the said respondents might be decreed to accept a lease of the said premises from the said appellant, and to execute to the said appellant a counterpart thereof upon the terms of the aforesaid agreement, the said appellant being ready and willing and thereby offering to execute such lease, and in all other respects to perform his part of the said agreement; and that an account might be taken, by and under the direction and decree of the court, of all sum and sums of money paid, laid out, and expended for

or on account of the said improvements, and that in the said lease the rent of the said premises might be fixed and determined at the said sum of 250*l.*, and together with an addition thereto, at the rate of 12 per cent. per annum, upon such sum of money as should appear to have been expended upon the said improvements over and above the said sum of 600*l.*; and that the said respondents might be decreed to repair and rebuild the said premises, and to enter into all the usual and necessary covenants, and to keep and leave the same in good and sufficient repair, and for general relief. The respondents denied that they had ever taken possession of any part of the property under the agreement, and they insisted that they were not bound under the circumstances either to rebuild the stores or warehouse, or to accept any lease with that obligation. Upon a record so framed, the substantive question between the parties was this—which of them was to suffer by the fire which had taken place; and unless the appellant was justified in requiring the restoration of the property by the respondents at their own expense, he was not entitled to any relief upon his bill. With respect to the only questions of fact in dispute, namely, the condition of the buildings when the fire took place, and the acceptance of possession by the respondents, the parties went into evidence the result of which appears to us to be as follows:—We think that, after the 1st of April, the possession remained very much as it had done before; the respondents continued in the occupation of that portion of which they were previously in possession, although their old title to such possession has ceased. The appellant remained in possession of that part which he held, and a part seems to have been unoccupied. The old buildings had not been repaired, and the new warehouse was so far from being completed and fit for occupation, that at the time of the fire it had neither doors nor windows, the floor of the second story was not laid, and that of the first was not complete. On the other hand, it appears that the delay had arisen in part from some alterations in the plan which had been suggested by the respondents, to which the appellant had assented, provided they were done at the expense of the respondents. Of the unfinished building (as far as any possession could be had of

it), both the appellant and the respondents seem to have had the use, by placing under the shelter of the roof such goods as they found it convenient to deposit there. Upon this state of the record and of the evidence, the Vice-Chancellor pronounced the following decree:—That the agreement contained in the letters set forth in the bill, and bearing date the 19th day of August, 1839, the 29th day of August, 1839, the 20th day of August, 1839, the 1st day of January, 1840, the 2nd day of January, 1840, the 3rd day of January, 1840, and the 3rd day of January, 1840, ought to be carried into execution, save and except the putting in order of the stores therein mentioned before the commencement of the lease thereby agreed to be executed, which was waived by the defendants, and did decree the same accordingly: and it was ordered that it be referred to the Master of the said court to inquire and state to the said court what amount was expended by the plaintiff on the new buildings in the pleadings mentioned, beyond the sum of 600*l.*; and it was further ordered, that a lease should be executed by the appellant to the respondents, of the premises in question in the said cause, for the term of five years from the 1st day of April, 1840, at the yearly rent of 250*l.* and 12 per cent. per annum on such sum as the said Master should find to be expended by the plaintiff on such new buildings as aforesaid beyond the sum of 600*l.*; such lease to contain a covenant on the part of the defendants for the payment of the said rent during the said term, and to restore the said premises at the expiration thereof in the same plight and condition as the same were at the commencement of the lease, and such other provisions as should be comfortable to the said agreement, save as aforesaid; and the said respondents were to execute a counterpart of the said lease, and they were thereby enjoined from shewing in any action at law that such lease was not delivered on the day of the date thereof. And it was further ordered, that the said lease should be settled by the Master in case the parties should differ about the same, and that the respondents should pay unto the appellant, or his solicitor, the costs of the said suit, to be taxed by the said Master. An appeal was brought by the present respondents against this decision, to the Governor-General in Council,

who, on the 20th of February, 1843, reversed the decree, and dismissed the bill, with costs. The propriety of this last order we have now to consider. The case was argued on both sides before us with great ingenuity and ability. On the part of the appellant it was contended, that he was entitled to have the buildings restored by the respondents to the condition in which they were when the fire broke out; but as upon the evidence it was impossible to argue that the appellant had completed the works which he had contracted to perform, it was admitted, that after the respondents had restored the buildings to their imperfect state, the obligation of completing them would rest with the appellant. The appellant's claim was rested on the principle, that a party who has entered into a binding contract for the purchase of an estate, becomes in equity the owner of it, and is entitled to any profit, and subject to any loss which may afterwards occur to it; and it was said that in this case, although the period at which the works were to be done had passed before they were completed; yet, that the respondents having waived any objection on that score, the contract was still subsisting, and the principle was to be applied. The case of *Pain v. Miller* (6 Ves.) was particularly relied on. In that case the defendant had contracted for the purchase of a house; the house was destroyed by fire after the period had passed within which the title was to be made out and the contract completed; but further time to make out the title had been allowed by the purchaser, who had accepted it before the fire took place, and, under these circumstances, the purchaser was held bound to pay his purchase money. The more familiar cases of the purchase of a life annuity, and the annuity dropping before the assignment, and the purchase of estates held upon a life, and the life dropping, were also referred to. (*Mortimer v. Capper*, 1 Bro. 156; and *Kenny v. Wixham*, 6 Mad. 355.) We have carefully examined these cases and several subsequent authorities on the same subject, the last of which is *Vesey v. Ellgood* (3 Drury & Warren, 76). Of the general doctrine so stated we apprehend that there is no doubt; but the question is, whether that principle, or any doctrine to be found in any of the

authorities, maintains the appellant's claim in this case. In ordinary cases of absolute and unconditional contracts, the risk is the risk of the purchaser, because that which is the subject of the risk is in equity considered to be the property of the purchaser. But treating the contract to take a lease as a contract to purchase, the warehouse was never in that sense purchased by the lessees until it was completed by the lessor; and until that had been done, therefore it was not the property of the lessees. They had never contracted to take an unfinished warehouse; they had never engaged to do any repairs, or to accept or restore any unfinished or dilapidated buildings; and although after the 1st of April, 1840, the contract was still binding in equity, provided the appellant performed it on his part, yet until he had so performed, no obligation attached on the lessees. They could not object that the lessor had not performed his engagement within the time limited, but they had a right to require that he should perform it before they were called on to accept a lease. They were to receive a complete building at the commencement of the term, and to restore a complete building at the end of it, and to pay a rent calculated upon the amount of the expenditure. The accident of the fire interrupted and delayed the completion of the work, but it could not relieve the appellant from his obligation to complete it. It was said that this case was decided by the judges of appeal upon some rules acted upon by courts of common law, but inconsistent with the principles of courts of equity. We are not aware that upon the main question in this case there could be any difference between the decision of a court of law and a court of equity. The question is, was it or not incumbent on the appellant to repair the old buildings and complete the new before he could require the respondents to accept a lease according to their agreement? If he was so bound, there is, in our opinion, nothing in the circumstances of this case which could relieve him from that obligation. The fire could have no such effect, nor would the circumstance that the delay in the completion of the building was in part attributable to the appellant's compliance with the sugges-

tions of the respondents. The contract, in equity, was subsisting, although by the omission of the appellant to complete his part of it by the time stipulated, it might have become void at law ; and if the appellant had been willing to restore the buildings, the obligation of the respondents to accept a lease might have been differently determined in law and in equity. But the construction of the contract, or the liability of the appellant within *some* time to perform what he had engaged to do before he called upon the respondents to accept a lease, was not at all altered. Had our opinion upon the main question been different from that which we have found, it would have been necessary to consider several points of great importance which have been discussed at the bar, and in particular, as has been contended on the one hand, that the court ought so to modify the relief prayed by the bill, or could so modify it, as to do substantial justice between the parties ; or whether, as has been insisted on the other hand, having regard to some of the terms of this contract, the alleged want of mutuality of remedy, and the difficulty (or as it has been called, impossibility) of placing the parties by any decree in the situation in which they ought by the contract to stand, the appellant should have been left to any legal remedy which he might have. The view which we take of the rights of the parties makes it unnecessary for us to enter into any discussion of these questions, further than as an examination of the relief which it has been proposed to ask appears to us to elucidate the principle upon which our decision is founded. It was said that there were two modes in which substantial justice might be done ; one was by decreeing a lease to be executed, dated on the 1st of April, 1840, containing covenants by the appellant to repair and complete the buildings, and by the respondents to keep in repair and restore them at the end of the term, and it was said that there would then be a subsisting lease, and an action against the appellant for the non-performance of his engagement to build and repair. But, in the first place, the respondents never entered into any such engagement, they never agreed to accept the appellant's covenant to do the work after the commencement of the term ; and if they had, the obligation on the appellant to complete

the building, notwithstanding the fire, would have remained precisely the same. Another mode suggested was this : that the lease should be dated as on the day of the fire, and that the respondents should be considered as taking the premises as they stood before the accident on that day, and should undertake, by some covenant, an obligation to restore them to that condition ; and that the appellants, on the other hand, should covenant to complete them when restored. Now, it is obvious, that this is to impose upon the parties a contract which they never entered into, either by expression or implication ; and although where a binding contract is subsisting, the completion of which, in its exact terms, becomes impossible through accident, without any default of the party seeking relief, a court of equity will struggle with points of form, it cannot, for that purpose, alter the substance of the agreement, or impose upon either party obligations totally different from those which by the agreement, he had contracted to perform. In this case there is no reason why the court, upon any principle of moral justice should at all desire to interfere. Both parties are equally innocent ; and the only question is, upon which of them the loss arising from an inevitable accident is to fall. The claim to relief has accordingly been very fairly rested in argument by the appellant, upon the general principle that the buildings, when the fire took place, were, in equity, the property, and therefore standing at the risk of the respondents. For the reasons assigned, we are of opinion that this principle is not applicable to the case, and that the decision appealed from is right, and must be affirmed. With respect to the costs, as there have been conflicting decisions below, the case was very naturally brought here by appeal ; but we think that, upon the main question, the respondents have, from the beginning, been right ; and that some material allegations of the bill, which must have been within the knowledge of the appellant, are directly contradicted by the evidence ; we do not think therefore, that there is any reason for excepting this case from the ordinary rule, and we think that the appeal must be dismissed with costs.

THE UPPER CANADA JURIST.

THE INSOLVENT LAW.

In the first number of the UPPER CANADA JURIST, we published an article on the subject Imprisonment for Debt, and we then called attention to a law that had been recently placed on the statute book, abolishing arrest in execution, and making various other changes in the mode of pursuing remedies between creditor and debtor; a law that we prophesied it would soon be found necessary to repeal, or very materially modify, as many of its provisions would be discovered to be almost impracticable. Its repeal has now taken place, and no part of it is embraced in the new law, except the form of affidavit to arrest on original process, and that is so modified, that the creditor is obliged to swear only to his debtor's intention to leave Upper Canada, instead of swearing to his belief of his intended departure from Canada, which deprived the creditor of the power of arrest, even though he might be well aware that it was his debtor's design to leave the Upper part of the province to reside in the Lower, with the very determination of defrauding him of his debt if possible. The obnoxious act has been superseded by the Insolvent Debtor's Law, which has introduced a new system into the province, which we have every reason to believe will be found on the whole highly beneficial in its operation; though we think that in many matters of detail advantageous alterations might be made. In all right and rational legislation upon the duties and liabilities of parties, arising out of failure to perform their contracts and engagements, the first and most important object will always be, to diminish the loss and inconvenience which the creditor is made to suffer through the insolvency of the debtor, and to place him as nearly in the position, in which by his engagements with his debtor he ought to stand, as the altered circumstances of the debtor will permit; and this being effected, care must then be taken that no greater amount of suffering shall be allowed to fall upon the debtor, than may

be necessary to give the creditor satisfaction, in such degree as it may be obtained from the debtor's property, and may prevent the encouragement of imprudence, fraud or dishonesty in others, in the contraction of debts. In Upper Canada, as in England, the measures that have been introduced at various times into the legislature on the subject of debtor and creditor, have not been framed in accordance with this principle: and indeed there has been no attempt at systematic legislation, for at one time we see a bill becoming a law, which has no object in view but providing a more stringent remedy for the creditor than he had before; and at another, as a kind of balance of power, an act receiving the sanction of parliament, with ample provisions for relieving the sufferings of the debtor, but with little or no consideration for the safety of the creditor. It was for the want of attention to this principle, that we were so strenuous in our objections to the now-repealed act for abolishing imprisonment in execution for debt, and our first objection to the law by which it has been repealed is, that it has not repealed *all* the existing laws relating to insolvency, and reduced the hitherto conflicting legislation to one graduated system. There are several statutes in force in Upper Canada, by which insolvent debtors in custody, both on original and final process, are enabled to obtain relief by a weekly money payment from their creditors, unless it is made to appear to the court that they are withholding their property, or have so disposed of it for some fraudulent purpose, that the creditors cannot make it available as a means of payment. These statutes should have been repealed by the new law, and the whole subject of insolvency placed within the same jurisdiction: while at the same time the extended remedies given against property in England by the act of 1 & 2 Vic., c. 110, might have well been made a part of our law. Arrest on execution has been restored, and may now be made in the same manner as under the old King's Bench Act, with the exception of the form of the affidavit of debt, where the arrest is founded on the presumed intention of the debtor to evade payment of his debt by leaving Upper Canada, and we think

that it is better that the law should be placed on this footing. The common law commissioners in England recommended the abolition of arrest, both on mesne and final process, but their recommendation was not adopted as to the latter, because it was properly considered that no writ of fieri facias or other process could be effectually brought to bear upon property which the debtor had invested in the names of others, or which though standing in his own name, was placed in foreign funds and securities, wholly without the reach of process from the courts, and that therefore the fear of the suffering and disgrace of imprisonment must still be left as a means of enforcing that payment from debtors which might be sought for in vain from their sense of justice. We do not pretend to deny that great evils would not arise from an unrestrained power given to the creditor over the debtor's person, but the former insolvent acts prevented any great abuse of the power, and the new law gives a most summary and effectual remedy against it, by the proceedings that may be taken before the judge or commissioner. By the act, which is 8 Victoria, ch. 9, four classes of persons are entitled to be relieved from actual, and protected against impending imprisonment. The description applied to the first class of persons relieved and protected from imprisonment is "any person not being a trader, within the meaning of the statute now in force relating to bankrupts." The description of the second class is, "any person not having been such trader before the passing of the said act." The description of the third class is, "any person having been a trader before the passing of the said (bankrupt) act, but excluded from the operation thereof." And the description of the fourth class is, "any person, being such trader, but owing debts amounting in the whole to less than 100*l*." The first and fourth classes of persons are of the same descriptions, except in the fourth class that the sum of 100*l*. is substituted for 300*l*., as those brought within the operation of the insolvent acts in England, 5 & 6 Vic. ch. 116, and 7 & 8 Vic. ch. 96, and the second and third classes are introduced in consequence of the Bankrupt Act having no retrospective force, and its provi-

sions not extending to cases of bankruptcy or insolvency before it was passed. Many of the imperfections in the Insolvent Act might have been easily avoided, by a more careful examination than seems to have taken place of the provisions of the English Insolvent Acts above referred to, and from which most parts of our act have been closely copied. In one class of cases the judge or commissioner appears to have no power to relieve, under circumstances in which it cannot have been intended to withhold relief. Where a trader is indebted in 100*l.* to parties who are indebted to him in any amount less than that sum, the actual amount of debt owing from him will be 100*l.*, although the available amount may not be more than 50*l.*, or even 20*l.* or 10*l.* In this case the trader would most probably not be considered entitled to the benefit of the Insolvent Act, though no fiat could issue under the bankrupt law. And a question may also well be raised, whether a person who has contracted debts while a trader, but who has ceased to trade before the presenting of his petition, is entitled to the benefit of this act as a non-trader, though as the discontinuance of a trade, whether *bona fide* or resorted to solely with reference to this act, would not exempt the party from the operation of the bankrupt law, or deprive him of the advantage which that law affords; and as the intention of the legislature seems to have been to restrict the insolvent law to the cases of persons who could obtain no relief under the bankruptcy law, it may be presumed that the act would not be available to him. The *trader* who applies for his discharge, or who seeks for protection under this act, must be a person owing, in the whole, debts to a less amount than 100*l.* An allegation to this effect is contained in the trader's petition, but no mode is prescribed for testing the truth of the allegation, nor is there any provision, except an indictment for perjury upon the affidavit, as to the consequences of such an allegation being shewn to be untrue. If it should be discovered at any time that the debts of the trader did in fact amount to 100*l.* at the time of presenting the petition, then all the proceedings before the judge or commissioner will be void, as the case was not within their jurisdiction; and cer-

tainly such a contingency might have been easily provided for, by directing that the decision of the judge or commissioner upon the first examination, should be so far binding, as to legalize all conveyances, &c., under the interim and final orders of protection, and should be incapable of being impeached, except by a proceeding before the judge or commissioner by whom the order was granted. This is the more necessary, as a debt might exist which the debtor might have considered entirely inoperative; as, for instance, a debt barred by the Statute of Limitations, because that statute does not extinguish the debt, which remains as before, but only takes away the *remedy by action*; and as there is no limit set to proving the proceedings under the insolvent law null, they may be disturbed under such circumstances at any distance of time. The debtor, whether in custody or at large, who comes within the description applied to any one of the four classes mentioned above, is entitled to be discharged from custody or protected against arrest, unless as to the latter the arrest is made under a judge's order, upon the presentment of a petition in the form prescribed by the schedule to the act, and the granting of an interim order of protection, whether the facts contained in the petition are true or false. No notice is required to be given to the party at whose suit the debtor is in custody, though a notice must be given to one-fourth in number and value of the petitioner's creditors. There is no reason, indeed, for requiring notice, either where a suit has been commenced, or where no legal proceeding has been taken, since, supposing it to be given, the judge or commissioner has no power under the act to inquire into the truth of the matters alleged, when the discharge or order for protection is applied for. When, therefore, the petitioning debtor sees reason to apprehend that any material statement will be successfully impugned, he has only to content himself with the opportunity afforded him by the interim order of protection, to remove himself and his property into the United States or elsewhere, out of the reach of his creditors and the jurisdiction created by the act, before the day appointed for his examination, and thus save both judge, commissioner and creditors the trouble of taking any further proceedings against

him. This is again legislating contrary to the principle which we stated at the commencement, and which is the only true principle on which legislation between debtor and creditor ought to proceed. The indulgence is all granted to the debtor; the security of the creditor is not regarded even for a moment, and yet the evil would have been easily remedied, by providing that the petitioner if in custody should remain there, or if at large, should give security for his appearance, or place himself in the custody of the court until the examination had taken place. The judge or commissioner is empowered to direct, in the final order, that some allowance shall be made for the support of the petitioner out of *his* estate and effects. By this is meant that the petitioner is to be supported out of an estate *once* his, but which has been transferred to his creditors in satisfaction of larger amounts due to them. It is a tax for the support of the insolvent, to be levied exclusively upon those who have already suffered by his insolvency, instead of throwing the burden of his subsistence on his friends or the public. This is borrowed from the English bankrupt law. In France, and other continental countries, the allowance of maintenance to the insolvent and his family, depends upon the decision of a majority of the creditors; though, if that decision is favorable, the amount of the maintenance, and the mode of affording it, is left to the authorities: yet in those countries there is no bankruptcy fund as there is in England, and as there might be here, and out of which the allowance might be taken without harshness to the debtor or injustice to the creditor. Upon obtaining the final order, the petitioner is protected from actions for debts contracted by him before the time of filing his petition; and, on the other hand, all property acquired by the petitioner after the order, may, under certain conditions, be made available for the payment of his debts. This seems to be a much more convenient course than that provided by the Roman law of *cessio bonorum*, through which Cæsar sought and obtained popularity among the poorer citizens. The *Lex Julia* protects from imprisonment the insolvent debtor not chargeable with fraud, who *withdraws himself* from his property (*cedit bonus*), or in other words, abandons it to his

creditors. This law of *cession*, which has been adopted with respect to non-traders in Scotland, France, and nearly all the continental states, after taken the debtor's present property, protects his person, but leaves him open to actions, and also to executions against his after-acquired property, at the suit of individual creditors, both old and new. The system introduced by the act is also preferable to the continental law of bankruptcy, under which, unless there be a composition (concordat) the bankruptcy is worked by distributing the effects, leaving the bankrupt after the final dividend liable to the action of each creditor for the unsatisfied portion of his claims, and it is also preferable to the system introduced by the English law of bankruptcy. By the first section of the act, the petitioner must have resided "twelve calendar months in the district" in which his petition for relief or protection is presented, but out of what period of his life the twelve calendar months are to be taken no where appears. The legislature may have intended, and from the form of the petition, we presume did intend, that the twelve months residence should be *next* before presenting the petition, but as this intention has not been expressed, there can be no doubt that any twelve months, though not consecutive, will be sufficient, and that they might be, for anything that appears to the contrary, the first twelve months of his existence. Neither is it necessary that the petition should be presented to the judge or commissioner of the district in which he is residing at the time his petition is presented, as the act only requires that the petition should be preferred before the judge or commissioner of "the district wherein he may have resided twelve calendar months," and the petitioner complying with the other requisites of the statute as to notice, &c., may be living at one end of the Upper Province, and his petition may be presented to a judge or commissioner at the other. The petition is required to be signed by the petitioner in the presence of a person described as attorney or "agent in the matter of the said petition." It may be presumed, from the frequent use of the word, "agent," when coupled with the word "attorney," as denoting an attorney who acts for the attorney immediately employed by the client,

that the agent referred to in this form must be an attorney, and such has been the construction that the insolvent commissioners have put upon the same form of attestation under the insolvent acts in England, because they have felt the inconvenience that would almost inevitably arise from allowing insolvents to be in the hands of persons, over whom no salutary controul could be exercised. After the expiration of the time allowed by the intermin order, or any renewal thereof, the petitioner who has been discharged from custody under it, may be again taken in execution. It is not stated whether fresh process must issue in such a case. There seems to be no reason why the sheriff should not be empowered to retake the petitioner, or his property, if they can be found, upon process already executed, unless such process has been returned. By the 17th section of the act, it is enacted, that when the assignee accepts a lease, or an agreement for a lease, to which the petitioner is entitled, "the said petitioner shall not be liable to pay any rent accruing after the filing of his petition, nor be in any manner sued after such acceptance, in respect of any subsequent non-observance or non-performance of the conditions, covenants or agreements therein contained." According to strict grammatical construction, the word "subsequent" would refer to the acceptance, whereas in practice it ought to refer to the filing of the petition; as there can be no reason why liability to conditions, covenants and agreements should continue longer than liability to rent. The extent of the protection afforded by the final order under the 29th and 31st sections does not seem to be very clearly or properly defined. The 29th section protects the petitioner against the claim of indorsees or holders of negotiable securities, but it contains no provisions in respect of the claims of parties, who as drawers, indorsors or acceptors, may be called upon to pay the amount of bills, for which the petitioner may be ultimately liable. The 31st section enumerates several species of debts which are to disentitle to the benefit of the act, and these seem to have been copied from the English acts without much consideration. There is no mention made in this section of damages for a malicious prosecution, nor the costs of a vexatious defence, nor is the petitioner excluded by

fraudulent preference. A voluntary preference may be legally fraudulent, without involving moral guilt; but it may exist in a form quite as odious as fraud in contracting a debt. A judgment for a malicious trespass is one cause of exclusion, but as the statute by which a judge certifies a trespass to be malicious is not in force in this province, it is difficult to understand how that cause of exclusion can apply. A breach of trust is also a cause of exclusion, and this is properly so, where the breach of trust is fraudulent, or for the personal benefit of the trustee, but it will have equal effect in excluding him from the benefit of the act, where, to save the *cestuique trust* from ruin, he has, at his own personal risk, advanced money upon leasehold security, &c., where he was authorized only to take freehold security. The act contains no provision respecting the property of the petitioner in case the final order is refused; and the imperial act 5 & 6 Vic. ch. 116, was open to the same objection, which was, however, removed by 7 & 8 Vic., ch. 96, which, upon such refusal, revested the property in the petitioner, subject to the acts done by the assignee. This we consider quite as objectionable as the omission in the former statute, as there can be no reason why after an adjudication that the petitioner is not entitled to his discharge, the property remaining in the hands of the assignee should not be applied in a rateable diminution of the liabilities which he has improperly incurred. Our objections to the Insolvent Act are merely against what appear to be errors in detail, which can easily be remedied by an amending act in the next session of the legislature, when the suggestion that we have thrown out for the entire repeal of all the old insolvent acts might also be adopted. We shall probably revert to this act at a future opportunity, as our object is to assist, as much as is in our power, in carrying out the important principle to which we have referred in the commencement of this article—a principle which we are convinced every one must believe it is most necessary to keep in view, in making alterations in the existing laws of debtor and creditor.

LAW AND FACT.

Malice, in the ordinary popular sense of the term, means simply an evil disposition of mind to cause misery, hurt or suffering. The law, however distinguishes between malice in law, and malice in fact. Malice in law, imports a legal inference, but it is one which is made by the law whenever a hurt or damage is wilfully done without any lawful authority or excuse. It is founded therefore, on that which is ordinarily mere matter of fact—the wilful doing of a hurtful act, which is prohibited to be done except where the law sanctions the doing. The adjudication, therefore, that any act is maliciously done, in a legal sense, involves the conclusion that the law does not sanction the act. It frequently, however, happens, that the law does not prohibit the doing of an act altogether, although its tendency may be to cause hurt or annoyance, but only *sub modo*: as where it is not done *bona fide*, but on the contrary, with the disposition to occasion hurt pain or suffering; that is, where it is done of malice in fact, or malice in the ordinary popular sense of the term. Thus the law prohibits the malicious publication of a writing hurtful to the character of another person: if such a writing be in fact published wilfully, and moreover without anything to warrant or excuse the act, malice is a mere inference of law from the facts; but if the publication had been on an occasion which would have furnished an excuse, provided the act were done *bona fide* with a view to the occasion, then the question being as to the existence of an actual malevolent design to injure, would be a question of malice in the ordinary popular sense of the term. In all such cases, the question of malice in law, involves the question of malice in fact. A peculiar and technical meaning is annexed to the term malice in the law of homicide. By constructive malice, or malice in law, is meant (according to Mr. Justice Foster) that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, and carry with them the plain indications of a heart regardless of social duty and fatally bent upon mischief. The words of this description seem to be too indefinite to furnish any certain rule or test for mere legal decision; and, expressed as they are in

popular terms, they would rather seem to describe matter of fact for a jury, than matter of law for the court. It must, in every such case, be an important and material question, in point of natural justice, whether the accused did not willfully place the life of the deceased or some other person in jeopardy by a wilful act or unlawful omission. If he did so, the case seems properly to fall within the description of one regardless of social duty, fatally bent on mischief. If he did not so wilfully put life in peril, it is difficult to suppose any case which would properly fall within this description of malice. It may be observed that this doctrine of constructive malice, which thus makes the inference of malice to be one of law, to be drawn by the court from the circumstances, without any inference in fact as to the mind and disposition of the accused in doing the act, has not been free from inconvenience in practice ; and that in some instances the court, for want of such a conclusion in fact, has been unable to pronounce any judgment. The question of fraud admits of a distinction analogous to that incident to malice, viz., fraud in law and fraud in fact. It was observed by Lord Ellenborough, in case of *Doe v. Manning*, 9 East., 50, that fraud or covin is always a judgment of law upon the facts ; but a fraudulent intention is usually a question of fact. Upon an issue taken generally on an allegation of fraud it is a question of fact, and there being in such case no fraud in fact, there is none in law ; per Buller, J., in *Pease v. Marlow*, 5 T. R., 80. Whether the taking of a tenement was in fraud of the laws relating to settlements of the poor is a question of fact ; so also, whether a bill of exchange was obtained by fraud.—*Grew v. Bevan*, 3 Stark., N. P. C., 134. The cases which have been referred to, and many others which might be cited, seem for the most part to consist with the positions already advanced, it remains to advert to a class of cases in respect of which much doubt has been expressed. In actions for malicious prosecution, it is well known that the negation of probable cause is essential to the maintenance of the action, and the difficulty has been to determine whether this is a question of law or fact. As to the term probable itself, it is no doubt one of known popular meaning ; and if

we look to the nature of the inquiry which this conclusion involves, it is one to which the powers of a jury are well adapted, and which are exercised by juries in analogous cases. It is one of the most important duties of the jury to decide whether the probabilities raised by the evidence in criminal cases be sufficient to warrant a verdict of guilty, and in other instances to determine on which side the probability preponderates. It is seldom, indeed, that questions of probability can be measured by any legal rule or test, or are capable of any other decision than by the sound sense and discretion of those who enquire. The existence of all those circumstances which tend to crimination are undoubtedly matters of fact; and the law has no better means of fixing the precise point where the force of such evidence shall be sufficient to warrant a prosecution, than it has for determining by rule, what shall be sufficient to warrant a conviction. Where, indeed, any rule of law intervenes, and perhaps where any such rule can be laid down, that rule must prevail, as in all analogous cases. According, however, to several modern authorities, the question, in the absence of any such rule, is a conclusion of fact for a jury. In *Davis v. Russell*, 5 Bing. 354, the judge directed the jury to consider, whether the circumstances afforded the defendant *reasonable ground* for supposing that the plaintiff had committed a felony, and whether in his situation they would have acted as he had done; and the court held, that the direction was substantially correct, and Best, J., observed, that it was for the jury to say whether they believed the facts, and if they believed them—whether the defendant was acting honestly. In *Beckwith v. Philby*, 6 B. & C., 637, Little Dale, J., directed the jury to find for the defendants, if they thought on the whole that the defendants had reasonable cause for suspecting the plaintiff of felony. And Lord Tenterden said, whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury. In *Macdonald v. Rook*, 2 Bing. N. C. 217, it was held that the judge was warranted in leaving the question of want of

probable cause to the jury, that question depending upon a chain of facts; and Tindal, C. J., observed, there are some cases, no doubt, in which a judge may be expected to tell the jury, whether or not a defendant had probable cause for proceeding against a plaintiff, as in case of a threatening letter or the like; but where the probable cause consists *partly* of facts and partly of *matter of law*, a judge would be warranted in leaving the question to the jury. In *James v. Phelps*, 11 Ad. & El. 453, the defendant had prosecuted the plaintiff under the stat. 7 & 8 Geo. IV., ch. 30, sec. 6, for maliciously and feloniously obstructing a mine, and the plaintiff was acquitted on the ground that he effected the obstruction under a claim of right by his employer, and by the employer's direction. It appeared in the evidence on the trial of the action, that there had been disputes between the defendant and the employer on the subject before the obstruction, and that the defendant knew from the plaintiff that the obstruction was intended as an assertion of the employer's alleged right. The judge at the trial nonsuited the plaintiff, but it was held, on motion to set aside the nonsuit, by the Court of Queen's Bench, that the judge was wrong in nonsuiting in such a case, that the question was one for the jury; and a new trial was granted. Lord Denman, in giving judgment, said, "Malice is a question that must go to the jury. The question whether there be or be not reasonable or probable cause may be for the jury or not, according to the particular circumstances of the case." It is clear, however, in the first place, that the question of probable cause is subject to several legal rules. The question as regards the defendant is, whether he had probable cause to excuse or justify what he did; and the existence of facts which alone, if known and acted upon, would warrant the conclusion of probable cause, cannot support it, if they were unknown to the defendant, or though known, if he also knew other facts which shewed that there was in truth no probable cause.—*Sir Anthony Ashley's case*, 12 Co. 92. So in an action against a magistrate for a malicious conviction, the question is not whether there was in fact probable cause for

convicting, but whether *he* had probable cause for convicting. —Burley v. Bethune, 5 Taunt. 580. There are also authorities which shew not merely that probable cause is a conclusion of law in particular instances, but generally, however numerous and complicated the facts may be. In Johnstone v. Sutton, 1 T. R. 545, it was said, that the question of probable cause is a mixed question of law and fact; that whether the circumstances alleged, to shew it probable or not probable, existed, is matter of fact; but that whether, supposing them to be true, they amount to probable cause, is matter of law. In Davis v. Hardy, 6 B. & C. 225, which was an action for a malicious prosecution for embezzlement, the judge nonsuited the plaintiff, and the court refused to set the nonsuit aside. In Blackford v. Dodd, 2 R. & Ad. 179, the action was brought by the plaintiff, an attorney, against the defendant, for a malicious prosecution, on a charge of sending a threatening letter, which was produced and read at the trial; the judge nonsuited the plaintiff, on the ground that there was reasonable and probable cause for preferring the indictment; and the Court of Queen's Bench held that the nonsuit was correct; that the evidence did not raise a question for the jury. There are also many other cases where the court has decided on the question of probable cause, many of which were capable of decision as matters of law, falling within the rules noticed in the case of Panton v. Williams, 2 Q. B. 169. In this case, it appeared that Panton had indicted Williams and two others for having forged a will; Williams, after an acquittal, brought an action for a malicious prosecution; Panton pleaded not guilty; and on the trial, a great mass of evidence was produced, as to the existence of probable cause. Lord Denman, before whom the cause was tried, having summed up the evidence, directed the jury that it was not a question of law, in a case of that sort, whether there was reasonable and probable cause, but that it was altogether a question of fact, for the jury. The counsel for the defendant tendered a bill of exceptions on this ruling, and the jury found for the plaintiff, 300*l.* damages. Tindal, C. J., on giving judgment, thus expressed himself: "Upon this bill of exceptions, we take

the broad question between the parties to be this: whether in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts that are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge; and we are all of opinion that it is the duty of the judge so to do." With respect to the inferences drawn from the course of pleading, according to the older cases, it is observable, that such authorities do not by any means prove that the question of probable cause is *always*, and in the absence of any specific rule or principle, adequate to the decision, to be regarded as a question of law, but only that such a rule or principle was applicable in the particular case. It seems however to be pretty clear, that formerly *all conclusions* as to what was reasonable or the like, were considered to be questions of law for the decision of the court, and of course the pleadings were framed accordingly, and they now prove no more than that such questions are dealt with as questions of law. Lord Coke seems to have argued, all laws must be reasonable, and therefore, what is reasonable is matter of legal determination: this is however by no means a necessary, or as it seems, a just inference; it consists not only with reason but with law, that matter of fact should be decided by a jury; this is what the great elementary rule which we have chosen for our text requires; and the question resolves itself ultimately into this—whether the conclusion of probable cause be in its own nature one of fact or of law. According to the older authorities, the questions not merely of reasonable and probable cause, but of reasonable time, and other such conclusions, seem as already intimated, to have been regarded as questions of law. The rule has already been adverted to—“*quam longum esse debet (tempus) not definitur in jure sed pendet ex discretione justiciariorum.*” And this position as to reasonable time was to be also applied to *all things uncertain* which ought to be reasonable; for nothing that is con-

trary to reason is consonant to law. It was therefore held that any such question should be determined by the judges, in order that legal consistency and uniformity might be preserved. The difficulty attending this doctrine, and the inconvenience which must necessarily result from a multiplicity of legal decisions on matters so uncertain as to *exclude* legal definitions, had been then experienced but in a small degree in comparison with that which has been felt in modern times. It was then, and has afterwards been, as it seems, too hastily inferred, that because reasonable time has in particular instances been deemed to be a question of law, it was to be so treated in all. In the case of *Darbishire v. Parker*, 6 East. 18, Lawrence, J., expresses himself to that effect, because in the case of *Tindal v. Brown*, 1 T. R. 167, the jury found merely the circumstances. It has been already seen that this general doctrine has been shaken by many more recent authorities. Lord Coke's comment on the very case mentioned in the text of Littleton, sec. 69, is materially impugned by modern authorities. It is there laid down generally, that "executors shall have reasonable time to take the goods of their testator from his mansion; and this reasonable time shall be adjudged by the discretion of the justices before which the cause dependeth, for reasonableness in this case belongeth to the wisdom of the law. A court would, no doubt, in the present day, under particular circumstances, pronounce upon such a question without the aid of a jury: they might hold that an hour was too short, a year too long a time to be reasonable; but in a case of real doubt the question would probably be considered to appertain to a jury. Several authorities have already been cited which militate against the more ancient doctrine. In *Tindal v. Brown*, to which Lawrence, J., refers in *Darbishire v. Parker*, the court held that there was sufficient foundation for *laying down a legal rule*, then but imperfectly established, as to giving notice of the dishonour of a bill of exchange. Lord Mansfield there observed, that "what is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts, such as the distance which the parties live from each other, the course of post, &c., but whenever a rule can be laid

down with respect to this reasonableness, *that should be decided by the court, and adhered to by every one for the sake of certainty.*

Lord Mansfield does not say that reasonable time ought *always* to be an inference of law from the facts, but only that it is to be such where a *rule of law can be laid down* as to reasonableness. So, according to the judgment of Lord Kenyon, in *Hilton v. Shepherd*, and *Hope v. Alder*, 6 East. 14 & 16, where no acknowledged rule or principle of law defines the limits between reasonable and unreasonable, the question seems to be for the jury under all the circumstances of the case. In *Smith v. Doe dem.* Lord Jersey, Abbott, C. J., said, "I conceive that, in this as well as in all other cases, courts of law can find out what is reasonable, and that in some cases they are absolutely required to do so. In many cases of a general nature, or prevailing usages, the judges may be able to decide the points themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite." General as these observations are, they are available to shew that the learned judge did not consider such questions to be exclusively questions either of fact or of law; and they clearly tend to shew the distinction between cases where a general rule can be laid down by reason of the generality of their facts, or an actually existing usage which requires only legal sanction to be a law, and all others, which depending on a multitude of special facts and circumstances, are for the decision of a jury. As it appears to be clear from the decisions and dicta to which we have referred in the course of the preceding observations, that the more ancient doctrine on this subject cannot be now generally sustained, we cannot but regret that it was found to be necessary to decide the case of *Panton v. Williams* upon authorities deemed to be incontestable, without much consideration whether the question of probable cause was in its own nature to be regarded as one of fact or of law, or whether the rule as there laid down was to be considered as generally applicable to all general conclusions from facts of the like description, or as founded on considerations peculiar to the particular class. We propose to

conclude with a few observations as to the comparative advantages or disadvantages likely to result from referring such conclusions to one of these modes of decision rather than the other, and on the question which course best consists with the important elementary rule on the subject, disregard of which would probably be attended with much inconvenience. There can be no doubt that where a plain practicable rule can be laid down for the decision of such questions, although it be of an arbitrary and artificial character, as in the case of putting an end to a tenancy by a six months' notice to quit, instead of leaving reasonable notice in each case to be decided upon its own circumstances, according to the ancient practice; or that of substituting a general rule as to the time of giving notice of the dishonour of a bill of exchange, in place of the decision on the peculiar facts of each case, such a rule is useful and beneficial. It is plain, on the other hand, that to refer such questions to the decision of the court, when they depended on a multitude of facts and circumstances too numerous, and of too complicated a nature to be susceptible of any definite and convenient rule, would be attended with inconvenience; legal, but almost imperceptible distinctions would be multiplied to an excessive and indefinite extent. Under such circumstances, uniformity of judgment would be impracticable, and many conflicting decisions would necessarily result. Whenever the court decided upon circumstances, the decision would become a precedent and rule of law; and as each decision would afford room by comparison for a great number of distinctions, the obvious effect would be to multiply precedents to an inconvenient and unlimited extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting in others, the inference of the jury in point of fact, substantial justice is administered, and the law is relieved from the perplexity occasioned by nice and subtle distinctions. The practice of referring the question of probable cause to the court in all cases, although no rule or principle of law be applicable, is open to much objection. A class so constituted, is in truth, as regards the general elementary rule, of an anom-

alous character. Described, as every such conclusion is, in popular terms, and capable of being decided in that sense by a jury, it is *prima facie* a question of fact: it would seem therefore to be anomalous to deal with it as a question of law, where there was no law to govern it, although undoubtedly whenever any such rule is applicable, the popular sense of the term merges in the legal sense, and the elementary rule applies as in other instances of applying a legal rule. It would be necessary, in pleading it as a defence to an action of trespass, to state all the circumstances which might possibly be necessary to enable the court to draw the conclusion. It might be requisite therefore, in some instances, to set forth on the record a great body of circumstantial evidence, consisting of those varied and numerous combinations of minute circumstances, which tend in evidence to a conviction on a criminal charge. Trials on such charges are often very long, and upon an action for a malicious prosecution, it would, in a doubtful case, be as impolitic to omit the allegation of any circumstance tending to criminate the plaintiff, as it would be to omit proof of it in evidence on the trial of an indictment. The question of probable cause frequently depends on evidence as to identity, similarity of handwriting, tracing of footsteps, &c., and sometimes not merely on the fact of similarity, but on the extent and degree of similarity; an adequate and correct statement of which on the record, in order to enable the court to judge of the effect which such evidence ought to produce on the mind of the prosecutor, would be impracticable. The practice of referring any such class of questions to the court, would be to impose on the latter the frequent burthen of deciding in the same cause many questions of this nature, in order to meet the state of facts that might ultimately be found by the jury. When the number of witnesses, and of facts and circumstances, were great, much labour would thus be incurred in exhausting all the different combinations which might possibly result, and precedents would be accumulated to an inconvenient extent. It is indeed necessary, in ordinary cases, that, to enable a jury to find a general verdict, the court should state the law, to enable

them to apply it to the facts: this, however, requires only an exposition of the known existing law, which governs the right or liability in question, and seldom requires that such multiplied phases of the case should be exhibited to the jury, as would be necessary for their instruction as to a general conclusion, such as probable cause, when it was governed by no general law; but the effect of each combination of facts depended on the mere discretion of the court. It may perhaps be said, that although the ordinary rule may be that reasonable time and other such conclusions, should be for the jury; yet, that in particular instances, such as that of probable cause, the question may, by a positive rule, be for the decision of the court, as of matters arising collaterally in the cause. It is obvious, that if this were so held, it would still amount only to a dispensation with the rule, or to an exception from it in respect of the particular class of cases. The questions or conclusions thus referred to by the court, would still, when they were not governed by any rule of law, be in their own nature questions of fact, which, in analogous cases could be decided by the jury, and the functions of the court any jury would be in great danger of being confounded. It would seem better that all conclusions of a general nature, as to matters of fact, where no known or positive rule of law can be applied to them, should be decided upon by a jury, a tribunal which, if not the best for the decision of matters of fact, is one which tends to keep questions of law and fact distinct from each other, and to prevent the evil consequences which the confusion would entail, not the least of which would be much uncertainty, much vexatious litigation, and of course large additions to the already daily accumulating mass of conflicting and frequently unsatisfactory decisions.

CASES IN THE ENGLISH COURTS.

MARTIN V. GRANGER.

2 Dowl. & Lown. 268.

The affidavit in support of a motion to set aside process served in a wrong county, stated that the process had been served more than two hundred yards from the boundaries of the proper county: Held, sufficient, without adding that there was no dispute as to boundaries.

A rule had been obtained by *Channell*, Serjt., calling upon the plaintiff to shew cause why the copy of the writ of summons issued in this action should not be set aside for irregularity. The affidavit upon which the rule was granted, stated that the defendant had been served at Garraway's Coffee House, in the City of London, being a place more than two hundred yards from the boundaries of the county of Middlesex, with a copy of a writ of summons issued into that county.

Dowling, Serjt., shewed cause. The affidavit is insufficient. It ought to have stated the place to have been more than two hundred yards from the boundaries, and also that there was no dispute as to boundaries; *Webber v. Manning* (a). [*Maule*, J.—When the place is near the boundaries of another county, it may be necessary to swear that there is no dispute about them; but surely there can be no occasion for such an allegation, when the defendant positively swears that the place is more than two hundred yards from the boundaries of the proper county. *Tindal*, C. J.—The argument would be the same, if the place were five miles off.]

Channell, Serjt., contra. Where the party making the affidavit, merely states his belief that the place is more than two hundred yards from the boundaries, he ought to add that there is no dispute about the boundaries; otherwise he might be stating his belief on a disputed point. Here, however, he swears positively that Garraway's Coffee House is more than two hundred yards from the boundaries of the county of Middlesex; *Harrison v. Wray* (b).

PER CURIAM.

Rule absolute.

TOWNSON V. JACKSON.

2 Dowl. & Lown. 369.

In an action for goods sold, &c., the particulars of demand stated the action to be brought "to recover the sum of £37, the balance of an account of £108," (giving no credit for any specific sums.) The defendant pleaded as to £5, parcel, &c., a set-off to that amount. Held, that it was a question for the jury to say, whether the balance claimed meant a sum, after giving credit for the £5 set-off.

This was an action for goods sold and delivered, and for money due on an account stated. The defendant pleaded the general issue and payment, to the whole declaration; and as

(a) 1 Dowl. 24.

(b) 1 D. & L. 366; See S. C. 11 M. & W. 815.

to the sum of 5*l.*, parcel of the moneys in the declaration, a set-off.

The particulars of demand stated the action to be brought "to recover the sum of 37*l.*, being the balance of the following account;" then followed various items for goods sold, amounting to 108*l.*, but no credit was given in express terms for any sums which reduced the 108*l.* to 37*l.*

At the trial before *Pollock*, C. B., at the last assizes at Appleby, the plaintiff proved by the admission of the defendant, that a balance of 37*l.* odd was due. The defendant proved his set-off of 5*l.*, and contended that the set-off was pleaded to so much of the balance claimed by the particulars, and that therefore the 5*l.* should be deducted from the 37*l.* The learned judge left it to the jury to say whether the balance claimed, meant a sum after giving credit for the set-off. A verdict was found for 37*l.*

Atkinson moved for a new trial, on the ground of misdirection, and submitted that the learned judge ought to have decided as a question of law that the set-off was pleaded to the balance. He cited *Eastwick v. Harman* (a), *Tuck v. Tuck* (b), Reg. Gen. Trin. T. 1 Vict. (c).

POLLOCK, C.B.—It was proved at the trial that the parties met together, and that the defendant then admitted a balance of 37*l.* to be due. I thought it was a question for the jury, whether the set-off was taken into consideration, when the defendant admitted the balance. The rule of court is, that a defendant need not plead payment of a sum for which credit is given in the particulars; but still it must be an open question for the jury to say, whether a balance exists upon the whole account between the parties. *Lamb v. Micklethwaite* (d) is quite decisive of this case: the only difference is, that that was a case of payment, this is one of set-off. Where a party demands a balance, without stating how that arises, if the defendant plead payment, the plaintiff may show that in his balance, credit has already been given for the sum pleaded. A set-off is not even within the rule of court, and

(a) 8 Dowl. 399; See S. C. 6 M. & W. 13.

(b) 7 Dowl. 373; S. C. 5 M. & W. 109.

(c) 8 A. & E. 280.

(d) 1 Q. B. 400; See S. C. 1 G. & D. 136; 9 Uowl. 531.

so the difficulty does not arise ; but supposing it did, *Lamb v. Mickletwaite* is a decisive authority, that though a defendant ought not to plead payment of a sum for which credit is given ; yet if he pleads payment, when the plaintiff claims a balance, it is a question for the jury, to say whether or not in such balance, credit has not already been given for the sum pleaded. Divested of technicalities, the matter stands thus : the plaintiff says, “ You owe me 100*l.* on the balance of account ; ” the defendant says, “ I have paid 50*l.*, and have a set-off to the amount of another 50*l.* ” At the trial, the plaintiff proves, by the admission of the defendant, that 100*l.* is due upon the balance of account : the defendant then proves payment of 50*l.* ; and a set-off of another 50*l.* ; the plaintiff then calls a witness to prove that the 50*l.* paid and the 50*l.* set-off are both included in the balance.

PARKE, B.—A set-off is not within the operation of the rule ; consequently, when the plaintiff says that he claims a balance, he only means to say, he is willing to take that sum ; but he is at liberty to prove any part of his demand, and is not bound to prove the extent of his demand. For instance, if he claims 100*l.*, and says that he is willing to take the balance amounting to 37*l.* odd ; if he proves any part of the balance, he is entitled to a verdict. When he gives credit in this form in the particulars, he only means to say, “ I am willing to take that sum stated as the balance.” The plea of set-off was to part of the 100*l.* demanded, not to the 37*l.* demanded. My lord was quite right in leaving it to the jury to say, whether or not the set off had not been taken into account when the defendant admitted the balance. It is perfectly settled that the new rule does not apply to cases of set-off, but only to cases of payment. —*Rowland v. Blaksley*.^(a) Independently of that question, supposing the pleas of set-off and of payment to stand on the same footing, this particular does not give credit for any specific sum set off or paid ; but only claims a balance.

Rule refused.

^(a) 1 Q. B. 403 ; S. G. 2 G. & D. 734.

BROWN V. NELSON.

2 Dowl. & Lown. 405.

Where a cause, and all matters in difference, are referred to an arbitrator, who is to make an award, the cost of witnesses, &c., attending before him are costs of the reference, and not costs of the cause.

This was an action against a surveyor for negligence in superintending certain repairs, alterations, and additions to a rectory house. The declaration contained three counts, and there were several pleas, upon which issues were joined. The cause, and all matters in difference, were referred by a judge's order to an arbitrator, the costs of the cause to abide the event, and the costs of the reference and the award to be in the discretion of the arbitrator. The arbitrator found all the issues for the plaintiff, and assessed the damages at 280*l*. He also found that there were no matters in difference between the parties, other than the several causes of action in the declaration mentioned, and directed that the costs of the reference should be borne by each party in equal moieties. The master allowed the plaintiff the costs of the pleadings as costs in the cause; but refused to allow him more than a moiety of the costs of the witnesses before the arbitrator, his attorney's charges and counsel's fees; on the ground, that such expenses were to be considered as costs of the reference, and not costs in the cause.

Fish moved for a rule, calling on the defendant to shew cause why the master should not review his taxation. The costs of maintaining the issues before the arbitrator, must be considered as costs in the cause. In *Mackintosh v. Blyth* (*a*), the arbitrator omitted to certify as to the costs of the reference, and it was held that they followed the verdict. [Pollock, C. B.—The certificate of an arbitrator is a totally different matter, for in that case all expenses are considered to be expenses in the cause. But where there is a reference to an arbitrator, who is to make an award, all proceedings before him are proceedings in the reference, and not in the cause.] The case of *Tregoning v. Attenborough* (*a*), is in point. There, in an action of trover, a verdict was taken

(*a*) 7 Bing. 733; See S. C., 5 M. & P., 453; 1 Dowl. 225.

for the plaintiff for the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, subject to the determination of an arbitrator under an order of *Nisi Prius*, as to the amount of the deterioration; the amount, together with the costs of the cause, to be paid by the defendant; it was held, that the expenses of the witnesses before the arbitrator were costs in the cause. *Taylor v. Gorden (a)*, may seem at variance with the position contended for, but in that case, there was a reference of matters *dehors* the cause, and that fact is relied on by *Tindal C. J.*, who says, "Here a very large field of inquiry was opened before the arbitrator, quite independent of the question at issue in the cause." But in the present case, the arbitrator has expressly found, that there were no matters in difference, except those in the cause.

POLLOCK, C. B.—If the arbitrator intended that the plaintiff should have these costs, he ought to have awarded them.

PARKE, B.—Costs in the cause are costs up to the time of the reference.

Rule refused.

WALLON V. MASKELL.

2 Dowl & Lown. 410.

A declaration stated that one J. was indebted to the plaintiff in 17*l.* 11*s.*, and thereupon, in consideration that the plaintiff would, for and on account of the said sum, accept the joint and several promissory notes of J. and one E., for payment of 17*l.* 11*s.* six months after date, and would thereby give time to J. for payment of the said debt; the defendant promised to pay the sum of 17*l.* 11*s.*, if the said promissory notes were not duly honoured and paid. It then averred the acceptance of the note, and the non-payment of it when due, although the said J. and E. were afterwards requested so to do; and notice of the premises to the defendant; and alleged for breach the non-payment of 17*l.* 11*s.* by defendant. The plea traversed the request to J. and E. *Held*, on demurrer, that the plea was bad. The giving a bill "for and on account," of a debt is, *prima facie*, an agreement to forbear enforcing payment of the debt, until the bill be due.

Assumpsit: the declaration stated, that before and at the time of the making of the promise, &c., one J. Johnson was indebted to the plaintiff, in a large sum of money, to wit, 17*l.* 11*s.*; and thereupon theretofore, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant,

(a) 9 Bing. 570; See S. C. 2 M. & Scott, 725; 1 Dowl. 720.

would, for and on account of the sum of 17*l.* 11*s.*, so due and owing from Johnson, accept and receive of and from Johnson, and one J. G. Elptrick, the joint and separate promissory note, in writing, of the said Johnson and Elptrick, bearing date the day and year aforesaid, whereby Johnson and Elptrick, jointly and separately, promised the plaintiff six months after the date thereof, to pay to him, the plaintiff, or his order, the sum of 17*l.* 11*s.*; and would thereby give time to Johnson for the payment of the said debt of 17*l.* 11*s.*, until the said promissory note should become due and payable according to the tenor and effect thereof; the defendant did then guarantee and promise the plaintiff to pay the sum of 17*l.* 11*s.* to the plaintiff, if the said promissory note for that amount was not duly honoured and paid by Johnson and Elptrick, or either of them, when the same should become due and payable, according to the tenor and effect thereof. It then averred, that the plaintiff, confiding in the said promise, did then accept and receive the said promissory note, of and from Johnson and Elptrick, for and on account of the said sum of 17*l.* 11*s.*, so due to him from Johnson as aforesaid, and did give time to Johnson for payment thereof, from thence until hitherto. That although the said promissory note afterwards, and before the commencement of this suit, to wit, on, &c., became due and payable according to the tenor and effect thereof; and Johnson and Elptrick were then, to wit, on the day and year last aforesaid, requested by the plaintiff so to do; yet that Johnson and Elptrick have not, nor hath either of them paid the sum of 17*l.* 11*s.* in the said note specified, or any part thereof, to the plaintiff; and the said note hath been from thence hitherto, and still is, in the hands of the plaintiff, overdue, and unpaid; of all which premises the defendant then, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the said sum of 17*l.* 11*s.*; but the defendant hath not paid the same, or any part thereof. Plea: That the plaintiff had not requested Johnson and Elptrick, modo et forma. General demurrer, and joinder therein. The plaintiff's points for argument were, that the plea is no

answer in law ; for that it was not necessary in law to make any request to the said Johnson and Elptrick for the payment of the amount of the note ; that as makers of the note, they were liable and bound to pay the same, without any request. The defendant gave notice of the following objections to the declaration. That the defendant was only to be liable, if the note were not duly honored and paid, an expression which implies that the holder was to present the note, and no presentment is averred. That the request ought to have been made by the holder, and when the note was due: neither of which points are averred. That the plaintiff was only to give time “thereby,” (*i. e.* by taking the note) until the note became due ; and he does not state that he gave time, by taking the note ; and he does by the word “hitherto,” aver that he gave time for too long a period.

Knowles, in support of the demurrer. *Hitchcock v. Humfrey (a)* is an authority to shew that the plea is bad. There the defendant guaranteed the payment of goods supplied, “in consideration of the plaintiff extending the credit already given to his son, and agreeing to draw upon him at three months ;” the defendant pleaded that the bill was not duly presented for payment, and that he had no notice of non-payment. *Tindal, C. J.*, in delivering judgment, says, “This turns upon the question, whether one who guarantees the due payment of a bill, drawn upon a third person for the price of goods supplied to him, stands in the same situation as if he were in fact the drawer of the bill : for if such be his true position, then undoubtedly he is not liable to an action, unless there has been a due presentment of the bill, and he has had due notice of dishonor. But I can find no case that at all warrants that position. On the contrary, *Warrington v. Furber (b)*, and *Swinyard v. Bowes (c)*, are authorities to shew, that one who is no party to a bill is not entitled to notice of its dishonour.” The Court called upon

Martin to support the plea. First, the request is a material and traversable averment. The contract of a guarantor has always been construed strictly, and his liability does not

(a) 6 Scott, N. R., 540 ; See S. C. 5 M. & G., 559.

(b) 8 East, 242.

(c) 5 M. & S. 62.

arise, except upon performance of a condition precedent. When a person guarantees the payment of a bill of exchange or promissory note, he understands that the bill or note requires a presentment for payment. This promissory note is payable to order, and there is no allegation that it was in the hands of the plaintiff at the time it became due. Suppose the bill had been indorsed over by the plaintiff, can it be supposed that the defendant is bound to search out the holder? [*Parke, B.*—Your argument only goes to shew that the defendant has made an improvident bargain: he ought to have specified the place of payment.] The word “dishonor” has a technical meaning, and implies that the bill has been duly presented. [*Park, B.*—That is against the drawer.] There is no reason for putting a different construction on the word “dishonour,” in the case of a party liable on the face of the bill, and of one liable on a collateral undertaking. The meaning of the word is explained in *Lewis v. Gompertz*. (a) [*Pollock, C. B.*—The plea traverses the request to pay. In an action against the parties themselves, the allegation of a request is mere form.] It is conceded, that when a party is primarily liable to pay, an allegation of request is unnecessary, the action itself being in law a request; but in this case the defendant only undertakes to pay if the bill be not *duly* honoured. The word “duly,” means a non-payment on request. Secondly, the declaration is bad for want of an averment that the note was presented for payment. A party whose debt is secured by a bill of exchange or promissory note, stands in a different situation from creditors holding other securities.—*Hansard v. Robinson*. (b) If the bill or note be lost, he cannot recover, and the party paying a bill or note has a right to the possession of it. The declaration is also defective in this; that the consideration stated is not that the plaintiff would give time; but that he would accept a promissory note, and “thereby” give time.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to the judgment of the court. With respect to the last objection, the declaration expressly shews not only that the plaintiff did give time by receiving the note; but that he

(a) 6 M. & W. 399.

(b) 7 B & C. 90; 9 D. & R. 860.

received it under circumstances, which compelled him to give time; the case of *Kearslake v. Morgan*, (a) having decided that a creditor, who receives a negotiable instrument "for and on account" of a debt, is presumed to have received it in present satisfaction, and the receipt operates as a suspension of the remedy on the debt. As to the other question, it chiefly turns upon what the parties meant by the words "duly honored and paid"—whether they intended anything more than the mere tautology, without any specific or definite meaning; or whether they meant "honored," by being presented on the day when the note was due, or "paid" at any time afterwards. I cannot help thinking that the word "honored" meant that the note should be presented at any time; and if "paid" at any time, the defendant should be discharged. The real question we have to decide is, whether the averment of a request has a different meaning in a declaration against the maker of a note, and in a declaration against a guarantor. It means the same thing in both cases and it would be inconvenient to hold the contrary. As against the makers of the note, the allegation would be mere form, and it would be sufficient to say that they had not, nor had either of them, paid the sum of money in the note specified. If sufficient as against them, it would be equally so against the guarantor. The contract in substance is, that the defendant guarantees that the makers of the note shall pay according to its tenor and effect, and they are bound to find out the owner and pay him. Inasmuch, therefore, as a presentment and request are immaterial, there must be judgment for the plaintiff.

PARKE, B.—I am of the same opinion. The first question is to the validity of the plea. The declaration is on a guarantee, and states that in consideration that the plaintiff would receive the promissory note of two persons, and thereby give time for the payment of a debt, the defendant promised to pay the debt, if the note were not duly honoured. It then proceeds to aver, that before the commencement of the suit, the note became due and payable according to its tenor and effect; and although the makers were requested so to do, they

(a) 5 T. R. 513.

did not pay it ; of which the defendant had notice. The plea traverses the request. Now, a request is quite immaterial, unless the parties to a contract have stipulated that it shall be made ; if they have not done so, the law requires no notice or request ; but the debtor is bound to find out the creditor and pay him. It is clear that the defendant is bound to pay the amount of the note when due and dishonoured ; unless there be some condition precedent on the part of the plaintiff which has not been performed. Then it is argued, that the condition precedent is, that the note should be presented for payment ; but it seems to me, that the words “ honored ” and “ paid ” are tautologous, and simply mean, that the note shall be paid when it becomes due. What I am reported to have said in the case of *Lewis v. Gompertz* (a), coupled with the facts of the case, is perfectly correct. There is no doubt that a merchant reading the plea in that case, would necessarily conclude that the bill was presented when due. A request is not necessary to charge the maker of a note,—he is bound to pay it when at maturity, and is bound to find out the person in whose hands the note then is. Upon this contract, the word “ dishonour ” means nothing more than the words “ not duly paid.” As to the other point, the giving a bill “ for and on account ” of a debt is *prima facie* an agreement to forbear enforcing payment of the debt, until the bill become due. I am, therefore, of opinion that the plea is bad, and that the declaration is good.

GUERNEY, B., and ROLFE, B., concurred.

Judgment for plaintiff.

JOYNES v. COLLINSON.

2 Dowl. and Lown. 449.

An affidavit in support of a rule for security for costs, stating that the plaintiff resides out of the jurisdiction of the court, *as this deponent is informed and believes*, is insufficient ; and such application being discharged on account of a defective affidavit, cannot afterwards be renewed upon an amended affidavit.

Temple had obtained a rule, calling on the plaintiff to shew cause why he should not give security for costs. The rule

(a) 6 M. & W. 399.

was obtained on the affidavit of the defendant, which stated, "that he has been informed, and verily believes, that the residence of the plaintiff is at Glasgow, in the kingdom of Scotland; and that he now, as this deponent has been informed and verily believes, resides there, out of the jurisdiction of this court."

Pashley shewed cause. The affidavit is insufficient. In *Archbold's Practice*, (a) it is said, "that when the affidavit proceeds upon the information and belief of the deponent, it should shew from what source his information is derived, and upon what his belief is founded." It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff "has been informed and believes," that the defendant is in insolvent circumstances.—*Symes v. Amor*, (b) *Mann v. Williamson*. (c) And *Sandys v. Hohler*, (d) expressly decides, that, in order to obtain a rule for security for costs, it must be positively stated that the plaintiff is resident out of the jurisdiction, and "belief" to that effect is insufficient. This affidavit would be satisfied by the fact of the defendant having told a third person to come and inform him that the plaintiff resided abroad.

Temple, in support of the rule. Where a deponent speaks to a fact, which must necessarily be more in the knowledge of the other party, it is sufficient to depose upon his "information and belief."

PARKE, B.—According to the books of practice, that is not enough. There can be no difficulty in making a positive affidavit; for the defendant has only to take out a summons, to be furnished with the plaintiff's residence.

Rule discharged, with costs.

The defendant, having subsequently delivered pleas, obtained an order from a judge at chambers, requiring the plaintiff to give security for costs. Whereupon,

Pashley obtained a rule to rescind the order, with costs, on the ground that the motion having been once made,

(a) p. 1018, 7th ed.

(b) 8 Dowl. 773; S. C. 6 M. & W. 814.

(c) 8 Dowl. 859; S. C. 7 M. & W. 145. (d) 6 Dowl. 274.

and refused, the defendant had no right to bring it forward again.

Temple shewed cause : and contended that the application was not the same, being on an amended affidavit.

PARKE, B.—The rule has already been disposed of on the ground of the defect in the affidavit, and the court ought not again to entertain the motion. If the court ought not to do so, much less ought a judge at chambers. There is a rule of the Court of King's Bench, Hilary Term, 3 Jac. 1, which orders, “that if any case shall first be moved in Court, in the presence of the counsel of both parties, and the court shall thereupon order between those parties ; if the same cause shall again be moved, contrary to that rule so given by the court, then an attachment shall go against him who shall procure that motion to be made, contrary to the rule of the court so first made : and that the counsel who so moves, having notice of the said former rule, shall not be heard here in court in any cause in that term in which that cause shall be so moved, contrary to the rule of court in form aforesaid.

Rule absolute. (*a*)

(*a*) Tidd's Prac. 506, 9th ed.; Cooper v. Jagger, 1 Chit. Rep. 445 ; Phillips v. Weyman, 2 Chit. Rep. 265 ; In re Hellyer v. Snook, *Ibid.*; and The Queen v. The Great Western Railway Company, ante, Vol. 1, p. 874 ; See also Withers v. Spooner, ante, Vol. 1, p. 17 ; S. C. 6 Scott. N. R. 692 ; 5 M. & G. 721.

THE UPPER CANADA JURIST.

CHITTY ON PLEADING.

Chitty's Treatise on Pleading and Parties to Actions; with Second and Third Volumes, containing Modern Precedents of Pleadings and Practical Notes. In 3 vols. The seventh Edition, corrected and enlarged, by Henry Greening, Esq., of Lincoln's Inn. S. Sweet and V. & R. Stevens and G. S. Norton, London : and Andrew Milliken, Grafton Street, Dublin. 1844.

Mr. Chitty's work on pleading has now been so long before the profession the first edition having appeared in 1808, its merits and, may we add its deficiencies are so well known, that it would be out of place were we, in noticing a new edition of it, to do more than touch incidentally upon the work itself. We shall therefore confine ourselves to the labours of the learned editor of this edition, giving him credit where credit is due, and not sparing censure where censure is deserved : as we hold it to be the bounden duty of the reviewer to exercise his calling without fear or favour, and more particularly in reference to new editions of works which have earned for themselves a professional reputation and standing, because such editions, if imperfect, are a wrong to the professional world, being as it were, false lights to lure them to destruction.

Any one who has paid the least attention to the progress of pleading law must be fully aware that a new edition of the above work was not uncalled for. It has been observed with considerable truth, that the law is in a transition state, and if this observation be true generally, how much more correct does it become when applied to the law of pleading, which has within the last ten years been so extensively altered by new acts and rules and the decisions thereupon, that the old pleader finds himself in a new world of "nice point and cherished technicalities ;" his former crochets banished from Westminster, his many counts cashiered, his favorite general issue superseded by special pleas, and his rare skill in sham

pleading a despised knowledge, bringing his "actions," if exercised, but to an untimely end, or himself into the labyrinth of special demurrers, which is, as all pleaders, know a kind of golgotha, where there are more skulls than brains.

This (the seventh) edition professes to be a corrected and enlarged edition, and the learned editor in his preface states, "that he has endeavoured to interfere as little as possible with the text of the author, and has not (he believes), except in the instances mentioned in the preface, made any important alteration without the authority of an act of parliament, a rule of court, or the decision of a common law court or judge." The learned editor then notices the alterations which he has made in the text, which he states will be found "to consist principally in striking out those portions which were more historical than useful in practice: such as the account of the ancient numerous and perplexing modes of commencing personal actions: the parts relating to bailable process, and the old forms of commencing declarations, as well as the account of the defence admissible under the general issue before the Pleading Rules of Hil. T. 4 Will. IV. contained in the seventh chapter of the last edition;" in the place of which he says he has endeavoured to give the present law and practice, using of course as much of the old material as he found applicable to the subject. The learned editor further observes, that "As to the notes to the first volume, it would be superfluous to observe on the labour which must necessarily have been bestowed on this part of the work," and says "he can only hope that the correction of the references and the insertion of the names of the cases, will be considered an improvement, and that the other additional matter will be found of considerable use and value." As regards the second volume—the learned editor claims a new arrangement of the forms of commencements of declarations in actions in inferior courts, and in actions removed from such courts to the superior ones, which in the former editions were intermixed with the commencements of declarations in actions originally brought in the superior courts, but in this are separated; he also claims to have expunged the forms of affidavits to hold to bail, introduced in the last edition, but now rendered use-

less, and to have given in their place forms of particulars of demand, with notes containing references to some of the most recent decisions on the subject; and further, he claims to have struck out such forms as have become useless in consequence of recent statutes, and to have corrected some few decided to be defective, and to have given new forms where rendered absolutely essential by changes in the law. The learned editor claims, too, to have supplied an acknowledged deficiency in the forms of counts on promissory notes and bills of exchange contained in the second volume of former editions, by the addition of nearly *sixty* new forms, and to have inserted various new forms of conclusions in debt, and to have given in the notes references to forms of a special nature introduced in reported cases, which he has abstained from inserting at large, in order not to increase the bulk of the work. The learned editor also states that he has made considerable additions to the notes of the second volume, which he believes will be found of great use to the practitioner. As regards the third volume, the principal alterations are stated to be the striking out those forms which have been decided to be bad, as amounting to the general issue, or as included in a common traverse, and the introducing new forms selected from reported cases, giving the references to such cases in the notes. In conclusion, the learned editor observes, "When it is considered that the work has been accomplished in a comparatively short space of time, and that since the last edition was published *a completely new system of pleading has been carried out in practice*, and consequently more numerous and important decisions pronounced on the subject than in double the same space of time in any other period of our legal history, I hope I may be permitted to ask for myself that indulgence in respect of inaccuracies which the learned author himself experienced through so many editions and during so many years."

We have been thus particular in distinguishing as to what the learned editor lays claim in this edition, that we may not visit upon him sins of which he has not been guilty. It would be an easy matter, were we so disposed, to point out the faults and omissions in the design and arrangement of

the original work, and then to censure Mr. Greening for not having remedied them. This, however, would not be fair, as we should then (to use a legal expression) be travelling out of the record, and blaming this gentleman as to matters with which he has not professed to deal. If, therefore, the learned editor has done that which he in his preface professes to have done, with due skill and diligence—if he has corrected, enlarged and altered the text in those places where alteration was rendered essential by new statutes, rules of court, or cases—if he has corrected the former references and added such new notes as time has rendered necessary—and if in the second and third volumes he has weeded and pruned and added to the various forms and notes in the manner alluded to in the preface, then we assert that in bestowing this edition upon the profession he has bestowed upon them a boon of no mean worth, and has deserved at their hands a reward corresponding in value to the extent and arduous character of his labours; for we consider that any gentleman who publishes for the advantage of his professional brethren, either a new work upon an intact subject, or a new edition of a standard old work, deserves well at their hands, provided in the former case the work is of standard excellence, and that in the latter case the new edition is equal in character to the original work, bringing it down to the period of such edition, and is not merely a reprint, with large pretensions but slight merits, rich in preface but poor in cases, extremely well executed as regards type and other mechanical appliances, but ill-performed in the departments where mind and industry should have appeared.

We have perused this edition with considerable care, anxious to extend to the learned editor that indulgence which he solicits in respect of inaccuracies, could we do so consistently with an honest judgment. We well know the labour attendant upon the editing efficiently a work of this sort, treating as it does upon a multitude of matters, many of them upon abstruse subjects, and involving a mass of fresh material, arising out of new cases, which requires the greatest industry to interweave with the original text. In the present case, the new decisions have been, as we have before hinted, unusually

numerous and important. And we are sorry to be obliged to state that, as regards the *first volume*, the learned editor has not introduced, or in any way referred to, many of great authority, intimately bearing upon the subject-matter treated of. Had these omissions been few and far between, we should have extended to them the indulgence craved in the preface; but when we find them so numerous as seriously to compromise the value of the work, we are in duty bound not to pass them over in silence; and however painful it may be to ourselves, and still more painful it must be to the learned editor, we are compelled to give an unfavorable judgment upon this edition. It is by no means what it ought to be; nor is it that which the professional public had a right to expect in a new edition of this work.

That we may not be considered as condemning without cause, or wantonly pronouncing an unfavourable judgment without sufficient warrant, we shall proceed to notice some of those omissions which have forced us to this opinion. At page 12, where the right of a covenantee not executing a deed to sue thereon is discussed, the case of *Aveline v. Whisson*, C. P. 21 L. J. R. 58, is omitted, and the important cases of *Cardwell v. Lucas*, 2 M. & W. 111; and *Gooch v. Goodman*, 2 G. & D. 159, are merely noticed incidentally in a note; the principle upon which those decisions turn, and which it would have been of advantage to the student at least, to have explained, not being touched on. At pages 133, 134, where the subject is again introduced, *Aveline v. Whisson* is certainly quoted in a note, and a little more light is thrown upon the subject; but in neither the one place or the other are the cases quoted in such a way as to be intelligible to an one not well acquainted with the subject. At page 4 is discussed the very important question whether or not an *entire* stranger to the consideration can sue upon a simple contract. Mr. Chitty, although it is difficult to collect accurately the full extent of his meaning, the whole of the passage bearing upon this subject being (as we conceive) studiously obscure, evidently leans to the opinion that a stranger to the consideration might sue upon a simple contract when the contract was made for his sole benefit; and he cites some old cases in support of the

view. Now we venture to assert that no legal proposition is more clear, than that an *entire* stranger to the consideration cannot sue upon a simple contract. The old cases upon the subject, and they are numerous, are collected in Viner's Abridgment, and the great weight of authority even there is against a stranger to the consideration so suing. In more modern times, the question has been beyond doubt, it being laid down as well settled in 2 Saund. 137 d, note b, citing *Bourne v. Mason*, 1 Vent. 6; and *Crow v. Rogers*, 1 Stra. 592; and in the late case of *Price v. Euston*, 4 B. & Adol. 433; 1 Nev. & M. 303, the same principle was adhered to; besides, we conceive the reason of the rule to be plain; a simple contract is a nudum pactum, without consideration to support it; and it is consequently a nudum pactum as regards any party suing thereon, who cannot bring himself within the line of the consideration, but is a stranger thereto. The only exceptions to the rule are bills of exchange, promissory notes, cheques, and other cases, where by statute the assignee of a chose in action may sue in his own name. At pages 33 & 36, where the right and liability of a married woman to sue and be sued in certain cases as a feme sole are discussed, the distinction drawn in the case of *Barden v. Keverberg*, 2 M. & W. 61, between the wife of an alien enemy and an alien ami, is not alluded to, that case being merely named in the note (at page 66) without further notice. Now at page 66 it is stated in the text that "a woman by birth an alien, and the wife of an alien, cannot be sued as a feme sole, if her husband has lived with her in this country, although he has left her here and entered into the service of a foreign state." This text is not now correct. The rule, as laid down by the above case of *Barden v. Keverberg*, is, that the wife of an alien enemy may be sued as a feme sole, because the wife of an alien enemy cannot lawfully be in England; but that the circumstances of the husband being an alien ami, who has never been in England, *semble*, does not render the wife liable as a feme sole, because a wife is only liable as a feme sole on account of her husband being abroad, *when he is civiliter mortuus*, which an alien ami is not. The text, therefore, required modification, and the distinction between the wife

of an alien enemy and an alien ami might well have been noticed. At page 41, where an agent's liability to be sued personally on a contract made by him in those cases in which he has exceeded the authority given him by his principal is treated of, two most important cases upon the subject are altogether omitted, viz, *Wilson v. Barthrop*, 2 M. & W. 863, and *Smout v Ilbery*, 10 M. & W. 1. The last case is quite a leading authority, having defined in what cases he is or is not so liable, as it may be collected from it that he is in a like manner liable when he exceeds his authority, whether he has fraudulently misrepresented his authority with an intention to deceive; *or* knowing he had no authority, has, notwithstanding, made the contract as having such authority; *or* *bonâ fide* believing that he has such authority vested in him, when he had in fact no such authority, has simply entered into the contract in mistake of his own powers: and the reason given for such liability in these cases is, that in all of them he equally commits a wrong; in the two first knowingly, and in the last, by representing as true that which he does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that it will ultimately turn out correct. The case also decides that an agent who exceeds his authority is not liable personally, unless guilty of some fraud, or unless he made some statement knowing it to be false, or represented as true that which he did not know to be so, omitting at the same time to give to the party contracting with him such information as would enable him to judge of the agent's powers equally with himself. Again, at page 42, in noticing what is such an appropriation by an agent of money received by him to be paid to a third party, as destroys the right of the party ordering it to be so paid to countermand his order, and sue the agent for money had and received to his use, the cases of *Lilly v. Hayes*, 1 N. & P. 26, and 5 A. & E. 548, and *Walker v. Rostron*, 9 M. & W. 411, both bearing materially upon the question, are omitted.

At page 47, the liability of a lunatic upon his contracts is mentioned. The text amounts to just two lines and a half, and there is only one case cited in the note, viz. *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170. Now as the question

has been much discussed and elucidated since the last edition by the cases of Tarbuck v. Bispham, 2 M. & W. 6; Dane v. Viscountess Kirkwell, 8 C. & P. 679, and as there are many other important cases upon the subject, in addition to the one case cited, either an alteration and enlargement of the text, or a note illustrating the cases, would have been desirable, inasmuch as the effect of leaving the matter as it at present stands is to compel the practitioner to go to other works for his information, this being so very bare as to be of no service.

At page 48 the law as to the liability of a retired partner for the old debts of the firm is laid down, and we find that the old text is left in statu quo, for which a single authority is given in the note, viz. David v. Ellice, 5 B. & C. 196, an authority so much shaken as virtually to be overruled by the later cases of Thompson v. Percival, 3 Nev. & Man. 167, and 5 B. & Ad. 925; and Hart v. Alexander, 2 M. & W. 484. Parke, B. in the latter case observing, "in David v. Ellice, the retired partner was held liable; but the court was substituted for a jury in that case, and I much doubt whether twelve merchants would have determined it as the court did. *The authority of that case*, as well as of Lodge v. Dicas, *has been much shaken* by Thompson v. Percival." How is it, we inquire, that the above authorities, with Kirwan v. Kirwan, 2 C. & M. 626; Thomas v. Shillibeer, 3 C. M. & R. 128; S. C. 1 M. & W. 124; and Wilson v. Bailey, 2 Scott, N. R. 115, are not introduced, authorities that have rendered the text inapplicable to the law as it now stands, and that contain the law upon the subject? Can we, in the face of omissions such as these, giving damning evidence of want of attention or want of knowledge, say that the editor has performed his duty well, or that the edition is a valuable one? Again, in treating of the liability of dormant partners at page 49, the case of Beckham v. Drake, 9 M. & W. 79, is not in any way noticed.

At page 51, in note, [q] it is laid down that, "the court will not permit the striking out of the names of one or more defendants to cure the defect" of a misjoinder of too many defendants in an action ex contractu. This is the old note, and unfortunately is not correct, as since the last edition the case of Palmer v. Beale, 9 Dowl. P. C. 529, which is not at all noticed, has been decided, the marginal note of which is,

that "where a plaintiff has made too many persons defendants, the court will, previous to trial, allow the name of one to be struck out of the proceedings subsequent to the writ, on payment of costs, the remaining defendants being allowed to plead *de novo*."

At page 55, in touching on the liability of the consignor and consignee for freight, the cases of *Sanders v. Vanzeller*, 2 G. & D. 244; *Coleman v. Lambert*, 5 M. & W. 502; *Sir John Tobin, Knight, v. Crawford*, 5 M. & W. 235: and *Amos v. Temperley*, 20 Law. Jour. Rep. 183, are omitted.

At pages 57, 123, and 131, it is stated in the text that debt will not lie against the assignee of part of the land demised by a lease, but only against the assignee of the whole: this is much too broadly stated, as debt lies against the assignee of part of the land for the *whole* term; 2 Saund. 182, note 1.

At page 62, it is asserted that where a promise made by a bankrupt to pay a debt barred by his certificate is conditional, that, *semble*, it is not sufficient for the creditor to declare upon the original promise, but that he must declare specially. This position is incorrect, as it is proper to declare upon the original promise, though the plaintiff must *prove* performance of the condition in evidence. The same rule holds good in the case of a conditional promise, to take the case out of the Statute of Limitations; and the reason is, because when the condition is once performed the promise becomes an absolute one to pay the original debt, and may be treated accordingly; *Irving v. Veitch*, 3 M. & W. 90, 110-112. This case might have been referred to, and quoted with advantage.

At page 63 it is said, "that a certificate under an Irish commission of bankruptcy, though it be since the Union, is no discharge of a debt contracted in England." This is the old text of the sixth edition, and the authorities given are the same as those quoted in that edition. Since then, however, the case of *Ferguson v. Spencer*, 2 Scott, N. R. 229, and 1 Man. & G. 987, has been published, which decides "that a certificate under the Irish Bankrupt Act, 6 & 7 Will. IV., c. 14, operates as a bar as well of debts due from the bankrupt in England or Scotland as of those incurred by him in Ireland;" being just the reverse of that which is in this edition stated to be the law.

In referring to the statute 11 Geo. IV. & 1 Will. 1V., c. 47, (the late act relating to heirs and devisees), at p. 60, it is not noticed that the act is confined to wills, &c., made by persons then (at the time of the passing of the act) in *being*, or thereafter to be made by any person whatsoever, (see sect. 2.) It does not in any way affect the wills of parties who died before the passing of it.

At page 73, where the rule is laid down as to the right of partners to sue jointly for slander of their joint interests, the case of *Harrison v. Bevington*, 8 C. & P. 708, is omitted.

At page 81, where it is laid down "that a party may support trover or trespass against his assignees, if he were not liable to the fiat," no mention is made of the 5 and 6 Vic. c. 122, s. 54, which provides that no official assignee shall be personally liable for any act done by him or by his order or authority in the execution of his duty as such official assignee, by reason of the debt, trading, and act of bankruptcy, or either of such matters, being insufficient to support the adjudication.

At page 88, the case of *Wright v. Maude*, 10 M. & W. 527, which bears upon the matter treated of, is omitted.

At pages 91 and 92, where the important question of a master's liability for the acts of his servant when driving a carriage or other vehicle, is discussed, the case of *Lamb v. Palk*, 9 C. & P. 629, is omitted.

At page 92, the old text, that "where the owner of a carriage hired off a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the court were equally divided in opinion upon the question, whether the owner of the carriage was liable to be sued for such injury," is retained, though the question has since been decided, and is now beyond doubt: true it is, that in a note it is mentioned that the question has been since decided, and the cases are given but neither in the text or the notes is noticed the leading case upon the subject, of *Maclaughlin v. Prior*, 4 Scott, N. R. 655. Again, since the sixth edition, several cases have been decided as to how far a master is liable for the acts of a person he is bound

by law to employ, or who exercises an independent calling, such as licensed drovers and pilots; there are the cases of *Lucy v. Ingram*, 6 M. & W., 302; *Milligan v. Wedge*, 4 P. & D., 714; *Rapson v. Cubitt*, 9 M. & W., 710, &c., &c.; all laying down or elucidating important principles upon an interesting branch of the subject, which it is not too much to expect that the editor should have noticed in this edition; yet they have no place therein, not even in a note, and a person trusting to this edition for his law would consequently be quite unconscious that the circumstance of the person employed being employed by compulsion of law, or of his exercising an independent calling, could in any way affect the question.

At page 92, in treating of the liability of a sheriff for the act of his bailiff, the case of *Smart v. Hutton*, 8 A. & E., 568, note, is omitted, and the distinction between a special bailiff and another is not noticed, it being stated generally that a sheriff is liable for the misconduct of his bailiffs in the course of the execution of their duties, whereas in the case of a special bailiff, he is not liable; *Ford v. Leche*, 1 N. & P., 737; his responsibility in such case only commencing when the prisoner is delivered into his actual custody.

At page 113, in stating that *assumpsit* will not lie to recover back money paid to redeem goods distrained damage feasant, the case of *Cowne v. Garment*, 1 Scott 275, is omitted.

At the same page, in stating that *assumpsit* lies upon foreign judgments, it is not noticed that it lies upon Scotch decrees, and the late cases of *Cowan v. Braidwood*, 2 Scott, N. R., 138, and *Russell v. Smyth*, 9 M. & W., 810, and 1 Dowl., N. S., 929, are omitted. And at page 113, where the same subject is again touched on, though it mentions that *assumpsit* lies upon Scotch decrees, yet the above case of *Cowan v. Braidwood* is omitted, and the case of *Russell v. Smyth* is only cited in a note, it being a case well worthy of more full notice, inasmuch as Parke, B., in his judgment lays down "a principle" which, wherever found in the common law, should not be lost sight of, as principles in this branch are so scarce and so entirely the exception, and small points so rife and so much the rule, that where met with, they should be cherished as gems of some price—Parke, B.,

lays it down that "when the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country."

Again, at the same page, in note (n), the Tithe Act is misquoted as cap. 44 instead of 74.

Again, at the same page, in touching upon awards, the late case of *Hoggins v. Gordon*, 2 Gale & D., 656, deciding that an arbitrator may maintain an action of assumpsit upon an *express* promise to pay him the costs of a reference, is omitted, so that in this unfortunate page there are no less than *four* errors of commission and omission.

At page 114, the old text is unaltered, and *now* erroneous. It states that the executor of a tenant for life may recover a proportion of the rent up to the day of the death of his testator, where the tenancy determined on his death, "though where the tenant held under a lease granted in pursuance of a leasing power, the remainderman must sue for the whole rent on such lease." This distinction has been got rid of by the statute 4 Will. IV., c. 22, s. 1, which enables an executor or administrator to recover such proportion of the rent in all cases, whether the leases were made by the life tenant and determined with his life, or whether, being under a power or otherwise, they do not so determine.

At page 115, it is said that "where a party has different securities of different descriptions for the same debt or demand, and from the same person, he must found his action on that security which is in law of the higher nature and efficacy." This rule is much too broadly laid down, as if such security of a higher nature have been taken, not in satisfaction of the lower one, but as a collateral and additional security, the lower one is not merged, and an action will lie upon it notwithstanding the higher security, and so if the higher security be void.

The cases of *Davies v. Davies*, 9 C. & P., 87, and *West, clerk, v. Turner, clerk*, 1 N. & P., 612, are not anywhere noticed, either under the title of assumpsit or elsewhere, nor is the late case of *Ritch v. Russell*, 3 Gale & D., 198, mentioned, which decides that a physician may recover on an *express* contract to remunerate him for his attendance.

At page 124, in treating of the action of debt for the arrears of an annuity, the case of *Randall v. Rigby*, 4 M. & W. and 6 Dowl. P. C. 650, is omitted.

At page 125, it is stated, that "upon the proceeding by scire facias upon a recognizance of bail, the bail are not liable to the costs of the scire facias, *unless they appear and plead thereto.*" This is the old text, and *was* the law, but it has been altered by the statute 3 & 4 Will. IV., c. 42, s. 34, which gives the plaintiff his costs in scire facias on a judgment by *default*, as well as after plea pleaded, or demurrer joined. Of this alteration no notice whatever is taken.

At page 129, it is stated that judgment in the plaintiff's favor in debt, is final at common law in *all* cases. This is not correct. Thus, in debt on the statute of Edward the Sixth for tithes, and in debt for foreign money, there must be a writ of inquiry, 2 Saund. 107 a, note b.

At page 152, in treating of nonfeasance, and whether case will lie for a nonfeasance founded upon a contract, the cases of *Young v. Tewson*, 8 C. & P. 55, and *Boorman v. Brown*, 2 Gale & D. 793, are omitted. The last case, which was decided upon error in the Exchequer Chamber, may be considered a leading authority upon the vexed question, whether an action of tort will lie for a nonfeasance, amounting merely to a breach of contract.

At page 164, where the law as to whether trover will lie for fixtures is mentioned, the late cases upon the point, in which the question has received much elucidation, are merely quoted in a note. This however is better than the omission of them altogether, though they throw so much new light upon the matter, that it would have been still better had the learned editor diffused its rays a little for the benefit of his readers.

At page 175, in treating of the right of one tenant in common to bring trover against another, the following passage (being the old text) occurs: "It seems to be questionable whether the mere sale by one of two joint owners of a ship, is a sufficient conversion to enable his companion to maintain trover against him, for such sale could not in law affect or pass more than the interest of the seller." In the note to this passage the case of *Farrar v. Beswick*, 1 M. W. 688, is simply

named, though in that case there are some valuable observations by Parke, B., on the point, he having observed, "I have always understood, until the doubt was raised in *Barton v. Williams*, 5 B. & Ald. 395, that one joint tenant or tenant in common of a chattel, could not be guilty of a conversion by a sale of that chattel, unless it was sold in such manner as to deprive his partner of his interest in it; a sale in market overt would have that effect." The distinction therefore (there is little doubt) is between a sale in market overt and not in market overt, the former being such a destruction in law as entitles one joint tenant or tenant in common to maintain trover against his fellow; the latter giving no such right, not amounting to a destruction of the thing in common, because a sale not in market overt does not alter the right of property therein.

At page 181, where the question of damages in trover is discussed, the late case of *M'Leod v. M'Ghie*, 2 Scott, N. R. 604, is omitted, and nothing is said as to the effect of a return of the goods converted before action on the amount of damages. While treating of trover, we may observe, that the case of *Whitmore v. Robinson*, 8 M. & W. 463, and *Skey v. Carter*, 11 M. & W. 571, the great importance of which it is unnecessary to enforce, are not alluded to, although at page 173 we find that in note(e) the 2 & 3 Vict., c. 29, is quoted, "as rendering valid executions bona fide executed and levied before the date and issuing of the fiat, notwithstanding a prior act of bankruptcy provided the execution creditor had not at the time notice of any prior act of bankruptcy committed by the defendant." Now here was a tempting opportunity for the mention of the above cases, which it is a mystery to us the learned editor could resist. We are satisfied he must have had a hard struggle with himself to do so, and had most cogent reasons for the omission. Be that however as it may, we take it that the profession would have been more gratified had he deferred his own feelings on the subject to theirs, and introduced the cases.

The case of *George v. Chambers*, 11 M. & W. 149, is not noticed in treating of replevin.

At page 186, in reference to whether trespass will lie for

an assault committed out of the Queen's dominions, the case of *Glyn v. Sir William Houston*, 2 Scott, N. R. 548, is omitted.

At page 207, it is laid down that trespass is the proper form of action, if there be a misnomer in the process, which has not been waived, though it be executed on the person or goods of the party against whom in fact it was intended to be issued." Now here the case of *Fisher v. Magnay*, 3 Dowl. N. S. 40, is omitted; the above is the text of the sixth edition, since which the case has been published. In that case, which was an action of trespass for false arrest, brought against the sheriff by the plaintiff in the name of F. W. F., the defendant pleaded a justification under ca. sa. issued on a judgment obtained against the plaintiff. At the trial the writ produced authorized the arrest of F. F., and it appeared that in the original action the plaintiff was so described, and that he had taken no means to procure the correction of his name, but that he had sworn an affidavit therein, in which he described himself as F. W. F., sued as F. F. Held, that the plea of justification was supported by the production of the writ, and of evidence of the identity of F. W. F. and F. F., and that the issue of the identity of the plaintiff, and the defendant in the former action, was sufficiently raised by the plea, without any averment that the plaintiff was known as well by one name as the other, and that the plaintiff having omitted to take advantage of the misnomer in the first action, had precluded himself from raising any objection on the ground of the misstatement of his name in the writ.

At the same page (207) it is said, when an officer arrests without warrant, "that trespass is the remedy against the informer, if there were no warrant, although it appears that some person had committed the offence, and it be one for which an arrest might legally be made without a warrant, provided there was not reasonable or probable cause for charging the plaintiff with having committed the offence." The late cases of *West v. Smallwood*, 3 M. & W. 418, *Hopkins v. Crowe*, 7 C. & P. 373, and *Wheeler v. Whiting*, 9 C. & P. 262, are here omitted, and the rule as laid down, is not correct. The law is, that if the informer *participates* in the

arrest, he is liable in trespass, if the arrest be wrongful; but if he merely makes a statement to the officer, but does not participate in the arrest, if he leave it to the discretion of the officer to arrest or not, and he arrests, the informer is not liable in trespass, though the arrest be wrongful; the remedy against the informer (in those cases where there is any) being case.

We are, however, fatiguing our readers by this painful enumeration of instances, or if we chose to deal in pleading phrases, we might aptly call it this assignment of errors. And as our only object in citing them at all was to show that we were not actuated by any malice prepense against the learned editor of the work itself, but that our opinion was founded upon the merits or rather demerits of this edition, and upon them alone, we consider that we have done enough in this way to make out our case, and shall therefore abstain from further notice of specific defects; suffice it for the above object, that we have shown the omission of above fifty important cases in 207 pages of the first volume. In the face of these omissions, it is impossible for us to come to any conclusion other than that we have arrived at, especially as the same want of attention and omission of cases, though in a modified degree, runs through the remaining portion of the first volume, which, being the volume that comprises the treatise portion of the work, is perhaps the one of the greatest general importance; the second and third volumes, comprising the forms, being of utility chiefly to the pleader by profession, though occasionally to the other branches of the profession as books of reference.

Of the second and third volumes we are happy in being able to speak in much more favourable terms than of the first volume. And if we may be allowed to express an opinion upon the subject, we should judge that by far the greater portion of the time and care devoted to this edition has been bestowed upon these volumes. We find more careful revision, and more copious and useful notes. Had the same attention been paid to the first volume we meet with here, we should, instead of using the sword, have perhaps been enabled to present the laurel; as it is, however, the errors of the first volume are so serious, both as to number and quality, in

consequence of its not being brought down to the present time, that they more than counterbalance any improvements or merits contained in the last two volumes, and cast their taint upon the whole edition, the two last volumes, without the first, being of value to a comparatively small number of practioners. As a whole, therefore, we must pronounce this edition a decided failure; and, in the name of the profession at large, must charge upon the learned editor the having done them a grievous wrong in putting forth an almost useless edition of a standard work, and thus depriving them, for some time at least, of a more perfect edition; as, until this is in a measure sold off, another edition is more than he dare except.

B.

—*Law Magazine.*

SIR EDMUND SAUNDERS'S REPORTS.

The Reports of the most learned Sir Edmund Saunders, Knight of several Pleadings and Cases in the Court of King's Bench in the time of Charles the Second. Edited by John Williams, Serjeant-at-Law. The Fifth Edition by John Patteson, Esq. [now one of the Judges of the Court of Queen's Bench], and Edward Vaughan Williams, Esq. The Sixth Edition by Edward Vaughan Williams, Esq. London: Benning & Co., 1845.

THE Terence of reporters, as Saunders was happily termed by the great Lord Mansfield, may be said to have met with a Bentley for his annotator in the person of Mr. Vaughan Williams. The terse, concise and simple elegance, of the Latin classic was not more richly illustrated—the *curiosa felicitas* of his sentences not more dexterously set off, and embellished—sometimes even overlaid—by the copious learning of the slashing critic, who selected those luminous pages for his text, then have the dramatic reports of our legal classic, with their clear simplicity, and exquisite precision, been adapted to the use of the modern student, by the exercise of an erudition at once extensive and profound, a judicious arrangement of new materials, and a discriminating

choice of topics the best calculated to initiate the pleader in the doctrines and mysteries of his great master.

Whilst Mr. Williams equals, however, the mighty Aristarch in learning, dilligence, accuracy and acquirements essential to the due discharge of his labours as editor, he is free from the defects which marred the character of the ancient scholar, without a single particle of his arrogance, rashness or conceit, and may be trusted by the student, as a sure interpreter and safe guide.

The reports of Saunders were printed originally in folio in the year of 1686 in the Norman French, when Jeffreys and the other Judges gave the *imprimatur* to their publication. A modern reader of the majority of reports would not loudly complain were such an *imprimatur* necessary now; he might not even feel excessive disappointment though they were printed in the same uncouth jargon, or in a similar unwieldy form. From its clear method and judicious choice of topics the work has formed ever since a pass key to open the treasures of the science—the text book of the pleader, what the Black-letter Bible with its marginal references was to the theologian, or Euclid to the geometrician. A new edition was called for in 1722, and printed in the octavo size. It was a happy thought of Serjeant Williams, at the distanee of more than a century from the original publication, himself a distinguished pleader and the pupil of Baron Wood, to illustrate with his mature knowledge and daily experience the then state of practice and pleading, and to comment on the lucid text in a series of detached disquisitions varying in their length and frequency by no fixed standard, but in the way his judgment deemed best to euclidate the law, as it was then interpreted and administered. To use his own words: “It occurred to the editor that if he could further recommend this book by making it a kind of introduction to the rules and doctrine of pleading, applied to practice, he should be employing his leisure time usefully to the profession, and advantageously to himself. With this view he has translated the entries into English, and, in order to induce the student to read them with attention, has too many of them subjoined notes, in which he has endeavoured to explain from authorities the grounds

and principles upon which the rules are founded ; has in some instances illustrated those rules by practical examples, and has pointed out the difference, when any such exists, between the present manner of pleading, and that which is used in the entry. When a note was begun, he was tempted to investigate the whole subject in the best manner he was able, from a hope at least, that a full discussion, though it much increased his labour, would be found more useful to the student, than mere references to cases, unaccompanied with any introductory observations." His able efforts at explanation and guidance were approved by a fourth edition in 1809, and admirably seconded afterwards by Mr. Justice Patteson and the son of Serjeant Williams, who completed the fifth edition in 1824. "They added all the cases which had been decided since the last edition upon the subjects treated of in the former notes ; and some few notes upon subjects not before discussed, which appeared to them to be connected with the matters contained in these reports." More than twenty years have elapsed since then ; the two most memorable decades in the history of the law, far more replete with judicial and legislative improvement than even the memorable epoch of Charles II.'s reign, which preceded the publication of the reports in the text. Were the amount of these changes and additions determined by their weight and bulk alone, they would be deemed most considerable. Nine quarto volumes of Ruffhead's Statutes at large—as great a number as the whole series from the ninth of Henry III. to the beginning of the reign of George III.—have been since heaped upon the already unwieldy mass of legislation. Twenty-nine volumes of reports by Barnewell and Cresswell, Barnewell and Adolphus, and Adolphus and Ellis, have been accumulated to a series still "stretching to the clack of doom," not to mention the labours of the duplicate, often triplicate, sets of reporters in each court. But the real importance of these legislative reforms and judicial decisions cannot be duly estimated by weight and rule, or measured out by statistics. Since the former edition of this work a completely new system of pleading has been introduced—matured—perfected, requiring increased ability in the draftsman, and additional wariness in

his instructors. The Administration of Justice Act, 11 Geo. IV. & 1 Will. IV., c. 70, gave a plenary power to the judges of making orders, which in six months might have the force of laws, and they wisely exercised the discretion entrusted to them by framing rules in Trinity Term, 1831, and Hilary Term, 1832, to assimilate the practice of the different courts—to abolish useless forms and empty verbiage—to render the proceedings in an action more clear, and precise, and definite—to accelerate the determination of the cause, and to diminish its costs to suitors. There may have been occasional harshness in the manner in which a judge has exercised his arbitrary will at chambers, limiting the plaintiff to a single count, and the defendant to one plea, when the exigencies of the case at the trial required a greater latitude of statement, but the general effect has been, beyond question, certainty, economy, and dispatch. By limiting the plaintiff to one count for each distinct cause of action, and the defendant to one plea for each separate ground of defence, each party is compelled to ascertain and state his case with accuracy and precision, divested of any superfluous allegations, which his proofs may be inadequate to support, and yet sustained by averments which may have been anxiously introduced in order to meet the scrutiny and objections of his adversary. When several counts or several pleas upon the same principal subject-matter could be adopted—when the same fact might be varied in shape or form at pleasure, it mattered little to the pleader that parts of his pleadings were incorrect; he was not bound to concentrate his case, and he sought refuge from the consequences of his ignorance of the facts, or of their legal operation, in the diversity and variety of his claims or defences.(a)

To exhibit pleading in its new and well-adjusted shape, attired as it has been in a novel garb, required the tact and facility of a practised and dexterous hand, and with such it is no idle compliment to say that Mr. Williams has always invested his subjects. We may instance the following clear and practical comments upon nice points of pleading.

(a) Joseph Chitty's Introduction.

“As an example of the proposition contained in the above note, that every traverse must be of matter of fact, and not of law, it may be mentioned, that where the declaration states certain facts, and then proceeds to allege that a duty on the part of the defendant arose therefrom, the defendant cannot plead, by way of traverse, that it was not his duty as alleged; for that would be a traverse of a mere inference of law, and therefore bad. 3 Bing. N. C. 334, Trower v. Chadwick; 3 Scott, 699, S. C.; 5 A. & E., 647, Cane v. Chapman; 1 Nev. & P. 104, S. C. And it should seem that, properly speaking, the rule as to a *virtute cujus* not being traversable, is but another example of this proposition; the reason for the rule being, that the *virtute cujus* only collects the matter alleged before, and draws a conclusion from it, and then being mere matter of law, it is not traversable. And in this point of view the rule is fully sustained by modern authorities, 9 A. & E. 292, Dangerfield v. Thomas; 1 Perr. & Dav. 287, S. C. Therefore, if it were alleged that A. was in custody of the sheriff at the suit of B., and that C., who had a judgment against him, delivered a ca. sa. against him to the sheriff, whereby he became and was in custody of the said sheriff at the suit of C., a traverse that he *thereby* became in custody at the suit of C. would be clearly bad; because the law says in such case he *does* become in the sheriff's custody at the suit of C. (see 1 Q. B. 525, Barrack v. Newton), and the traverse therefore would be a traverse of a mere matter of law. 10 Bing, 193. But although an allegation of a mere result of law is not traversable, yet an allegation, compounded of law and fact mixed, may be traversed. 6 A. & E., 482, Ransford v. Copeland; 1 Perr. & Dav. 671, S. C.; 11 A. & E. 529, Drewe v. Lainson; 3 Perr. & D., 245, S. C.; 8 Mees. & W. 1, Rutter v. Chapman. For example, an allegation in a plea that a company were illegally associated to more than the number of six as bankers, is traversable. 6 A. & E., 482. And accordingly it is now settled that a *virtute cujus*, where it is mixed with matter of fact, and does not put in issue a mere conclusion of law, is traversable. 4 Bing., 729, Lucas v. Nockells; 2 Y. & J., 304; 1 Moo. & P., 783, S. C.; 10 Bing., 158; 3 Moo. & Sc., 627; 7 Bligh, N. S., 140, S. C. in Dom. Proc. Thus, if in an action of trespass the defendant pleads in justification a seizure of goods as sheriff by virtue of a writ of fi. fa., the allegation of the seizure of the goods *by virtue of the writ* is not a matter of law, but of fact, and is therefore traversable. Lucas v. Nockells, ubi supra; 8 A. & E., 872, Carnaby v. Welly; 1 Perr. & D., 98, S. C. And by a replication to such a plea, admitting the writ, and adding de in-

juria absque residuo causa, the plaintiff may raise the question of fact, whether the sheriff seized by virtue of the writ or not; and may shew under that traverse that the acts of the defendant were not really done under or in execution of the writ, but for another purpose under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods. *Lucas v. Nockells*, *ubi supra*; 1 Bing., N. C., 387, *Price v. Peck*, per Tindal, C. J.; 1 Scott, 217, S. C.”^(a)

But the diligence and research of Mr. Vaughan Williams are not restricted to points of pleading alone. Upon all the collateral topics of law and practice, to which the commentaries of the former editors have been directed, there have devolved so many and such important statutory enactments, as to form a new era in legislation; the series of acts which bore the respected name of Lord Tenterden—the acts for limiting the period of undisturbed possession, and facilitating transfers of real property; the Will Act, the Copyhold Act, the Prescription Act, have produced most extensive and salutary reforms, and have been followed by more numerous and weighty decisions, than in tenfold the same space of time during any other period of our legal history.

Equally great, if not greater, changes have swept over the form, and constitution, and doctrines of the common law. Not to mention the vast alterations in the criminal law, the poor law, the law of the constitution from the Reform and Municipal Corporation Acts, as generally inapplicable to the subject of the present work, what an expanse of improvement has been opened by the law for abolishing arrest or mesne process, for allowing amendments in the record, and increasing arbitrations by preventing parties from revoking their submission; by those very useful and important statutes, 3 & 4 Will. IV. c. 42, s. 1, and 1 & 2 Vict. c. 100, enabling the judges by any rule or order to make such alterations in the mode of pleading as to them may seem expedient; by the law of interpleader, entitling the sheriff to relief against doubtful claims; by the law which affords to judgment-creditors more effectual remedies against the real and personal estates of their debtors; by directing writs of trial to the sheriff for sums under 20*l.*; by preventing delays to creditors

(a) Vol. i. 23 a.

from frivolous writs of error ; by the Attorneys' and Solicitors' Act ; by the Act for the Confirmation and Prolongation of Patent Rights ; by the law of Tithes, and the law of Libel.

To render the text of Saunder's correct, and the former commentaries intelligible, it became absolutely necessary that the present editor, from the affluence of his commonplace book, should furnish a copious accompaniment of corrective, and supplementary, and explanatory notes, at the foot of almost every page.

“Quæcunque in foliis descripsit
Digerit in numerum.”

Of the ample measure “pressed down and running over” with which he has illustrated and explained these progressive amendments, the following forms an excellent specimen ;

“In some of the cases above cited, and likewise in the subsequent cases of *Young v. Timmins*, 1 Cr. & J. 331, and *Horne v. Graves*, 7 Bing. 735 ; 5 M. & P. 768, S. C., the judges appear to have considered that *adequacy* of consideration was essential to support a contract in restraint of trade. But later authorities have repudiated this doctrine, and have established that the court cannot inquire into the *extent* or *adequacy* of the consideration ; 6 A. & E. 438, *Hitchcock v. Coker* ; 1 N. & P. 796, S. C. ; 6 A. & E. 959, *Archer v. Marsh* ; 2 N. & P. 562, S. C. ; 3 M. & W. 545, *Leighton v. Wales*. The law now is, that total restraints of trade are absolutely bad ; and that all restraints, though only partial, if nothing more appear are presumed to be bad. Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments shewing circumstances which rendered such contract reasonable, the instrument is void ; 11 M. & W. 665. But if there are circumstances recited in the instrument, (or probably if they appear by averment), it is for the court to determine whether the contract be a fair and reasonable one or not : and the test appears to be whether it is prejudicial or not to the public interest ; for it is on grounds of public policy alone that these contracts are supported or avoided ; *Ibid*. Partial restraints of trade in the instance of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place, (which is in effect the sale of a good-will), and in that a tradesman, manufacturer, or professional man, taking a servant or clerk into his service, with a contract that he (the servant or clerk) will not carry on

the same trade or profession within certain limits, have been supported as being, not injurious to trade, but rather securities necessary for those who are engaged in it; provided the limits within which the restraint is to operate are not unreasonable; for, where the restraint is larger than the protection of the person with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it, must be therefore void: 7 Bing. 743; 6 A. & E. 454; 2 M. & Gr. 32, 33; 5 M. & W. 561; 11 M. & W. 667. In the application of this latter test, twenty miles round a place has been held a reasonable limit in the case of a surgeon; 2 Chitt. Rep. 407, *Hayward v. Young*: London, and one hundred and fifty miles round, in the case of an attorney; 4 East, 190, *Bunn v. Guy*. Five miles from Northampton Square, in the county of Middlesex, in the case of a milkman; 2 M. & Gr. 20 *Proctor v. Sargent*; 2 Scott, N. R. 289, S. C.; and London in the case of a dentist; 11 M. & W. 653, *Mallan v. May*. But in the last case a restriction of carrying on the business in 'London or any of the towns or places in England or Scotland, where the plaintiffs or the defendant on their account *might have* been practising before the expiration of the said service,' was held unreasonable, and therefore void as to the latter part (though the former part as to not practising in London, was valid, and not affected by the illegality of the latter). It must further be observed, that the principle on which restraints of trade *partial in point of space*, have been supported, has not been applied to restraints *general in point of space, but partial in point of time*; for that which the law does not allow is not to be tolerated because it is to last for a short time only. Therefore, a restraint in the case of a coal-merchants' town traveller and clerk, that he should not follow or be employed in the business of a coal merchant *for nine months* after he should have left the service, was held void; 5 M. & W. 548, *Ward v. Byrne*. So a covenant by the lessor of a brewery, that he would not, "*during the continuance of the demise*, carry on the business of a brewer, or merchant, or agent, for the sale of ale in Sheffield or elsewhere or in any other manner howsoever be concerned in the said business," was held void; 1 M. & Gr. 195, *Hind v. Gray*; 1 Scott N. R. 123, S. C. (But see contra, 3 Beav. 383, *Whittaker v. Howe*, in which case Lord Langdale, M. R., held, that an agreement by a solicitor for a valuable consideration not to practice as a solicitor in any part of Great Britain for twenty years was valid). Further authorities confirming the doctrines above stated will be found in 3 Y. & J. 318, *Wickens v. Evans*; 3 Bing. 322, *Homer v. Ash-*

ford ; 11 Moo. 91, S. C. ; 2 M. & W. 273, Wallis v. Day ; 3 M. & W. 545, Leighton v. Wales. The question whether the contract is unreasonable or not is for the court and not for a jury ; 11 M. & W. 653.”(a)

And again :

“ As to the right to set dog-spears or other engines for destroying dogs in the pursuit of game, see 7 Taunt. 489, Deane v. Clayton ; 2 Marsh. 577, S. C., and 1 B. Moore, 203, S. C., in which case the Court of Common Pleas was divided in opinion. (The Court of Exchequer have lately decided in favour of the right ; 8 Mees. & W. 782, Jordan v. Crump). And as to man-traps and spring-guns, see 3 B. & A. 304. Holt v. Wilkes, in which it was holden that a person *having notice* that spring-guns were set in a wood, and nevertheless trespassing in it, could not maintain an action for an injury sustained from them. But the general question was not settled. (The action was afterwards held maintainable in a case where the plaintiff had no notice that the gun was set, on the principle that setting spring guns without notice was an unlawful act, independantly of the statute 7 & 8 Geo. IV. c., 18 (which had passed in the interval between the commencement of the action and the argument) ; 4 Bing. 628, Bird v. Holbrook ; 1 M. & P. 607, S. C. Some doubt has been entertained whether that principle was correct ; 8 Mees. & W. 789. The statute, however, has made the setting or placing of spring-guns, man-traps, or other engines calculated to destroy human life, or inflict grievous bodily harm, with intent that or whereby the same may destroy human life or inflict grievous bodily harm (except in a dwelling-house at night), not merely an unlawful act, but a misdemeanor. (See further on this subject, 1 Q. B. 37, Lynch v. Nurdin.)”(b)

The task must have been one of no slight difficulty to interweave with the notes a clear exposition of the notes as it stands, upon the various topics which these multifarious, judicial and legislative reforms have explained or qualified, reversed or confirmed. Sometimes the labyrinth has been too intricate and tortuous for the skilful commentator to find a clue ; confusion too much confounded for even his accumen to extract a clear principle, or decide *ex cathedra* what is the law. Unable to discover a safe resting place for the anxious inquirer from this conflict of adverse decisions, Mr. Williams, a sort of ductor dubitantium, is thus compelled to confess his perplexity and disappointment.

"But the defendant may prove under the general issue in mitigation of damages, rumours previously current. 2 Camp. 251, Lord Leicester v. Walter. It was determined by the Court of Exchequer in 11 Price, 235, Jones v. Stevens, that evidence of the plaintiff's general bad character was not admissible in mitigation of damages under the general issue, (and the court seemed to deny Lord Leicester v. Walter to be law.) Nevertheless, it is mentioned in 2 Stark. Ev. 642, note (e), 3rd ed., that in Mawby v. Barber, Lincoln Summer Assizes, 1826, Lord Tenterden admitted general evidence of the plaintiff's bad character, and that such evidence was also received by Lord Denham after consulting Park, B., in Moore v. Oastler, York Spring Assizes, 1836, and by Coltman, J., in Hardy v. Alexander, Liverpool Summer Assizes, 1837. The distinction above taken by Chambre, J., appears to have been disregarded by Lord Tenterden in Mawby v. Barber, Stark, *ubi supra*. And yet, in an action of slander for imputing felony, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue and also pleas in justification of the slander, averring that the charge of felony was true, his lordship held that evidence of general good character was not admissible for the plaintiff, and observed that if such evidence was admitted then the defendant must be allowed to go into evidence to prove that the plaintiff was a man of bad character. R. & Moo. 305, Cornwall v. Richardson. So that the law on the subject appears to be very unsettled." (a)

In this unsettled and unsatisfactory state several departments of the law may be expected for some period to remain. The hand of the legislative and judicial reformer having been at least as active in pulling down as in building up, in demolishing as in re-constructing.

"Diruit, ædificat, mutat quadrata rotundis."

Meantime, extreme circumspection is necessary to prevent stumbling between the ruins of the former, and the rising buildings of the modern, system.

Instead of reconciling the old state of the law with the new, and guiding his readers over a ground almost impeded with innovations, the present editor might have abbreviated the amount of his labours by expunging from the work all the learning that had been rendered nugatory, and the notes that were become obsolete—and by rejecting disquisitions on

subjects that had lost with the process of amendment their practical interest. This plan would have rendered the work of more instant utility as a companion in court, would have given it the charm of ready access to a practitioner, and enabled him to ascertain that, which in general forms the height of his ambition—what the law actually is on any given subject, not what it was or what it ought to be. This method would have been accompanied with a diminution in bulk, which, in the estimation of the majority, who incline to the truth of the proverbial axiom, “a great book a great evil,” might be considered unmitigated good. Indeed it must be conceded that the limit on the title-page of these ponderous but valuable tomes “In two volumes” is a legal fiction!

It would have saved the constant foot-note of a learned commentary on *scire facias*; “but the law in this respect has been altered by statute 1 Will., IV. c. 70, s. 8.”(a) The beginner would not have been tantalized after reading some excellent antiquarian lore on the courts of Great Sessions in Wales by seeing, when he glanced below, “these courts were abolished by statute 1 Will. IV., c. 70, s. 14.”(b) The constant “But now”—“But see,” recur with fearful frequency, though to these amendments we cannot apply the saying that, “*But* is a malefactor.”

In one instance, where the serjeant had revelled in a learned disquisition upon the question of nine returns between the teste and return of the *summoneas ad warrantizandum*, had proved conclusively that the tenant cannot vouch in an assize, and had shown how the statute of Gloucester provides for foreign vouchers by tenants impleaded for lands in London, &c.,—the son feels himself compelled to add, after re-printing all this obsolete learning, in a sort of mournful postscript, “In consequence of the abolition of real actions by statute 3 & 4 Will. IV., c. 27, the learning of the note above has lost much of its importance.”(c) Flat contradictions might also have been spared, e. g. first note: “The better opinion seems to be, that in debt for rent eviction may be given in evidence under the general issue.”

(a) Vol. ii. p. 71 a.

(b) Vol. ii. p. 101 b.

(c) Vol. ii. part 1, p. 32.

Second note: "Since the new rules it must be pleaded." And again, "In a declaration for libel, if the words are in a foreign language *it is safer* not to translate the words." Note second: "But it should seem that it would now be held necessary to set out a translation in the declaration, 3 Br. & B. p. 201." There can be no doubt that a translation must be set out, or the declaration would be bad on general demurrer.

Notwithstanding those objections, which seem so plausible in statement, we have arrived at an honest conviction that the method pursued by Mr. Vaughan Williams is the most useful, as the most generally instructive, the safest and best. The main design of the work was to teach the student and pleader in chambers at the commencement of their career, and they would be only half taught were the view of the former state of the law and retrospect of the changes it has undergone omitted. In order to understand the full force and effect of the new rules, it was necessary to show the exact manner in which they have operated on the preceding system; that a full comparison might be instituted between new forms of pleading and the old it became essential to trace and contrast principles, and thus enable the learner to ascertain for himself how far they are now more distinctly developed and more consistently applied. It would be difficult to conceive a better course of discipline than the review of conflicting decisions, which may thus be instituted, and the patient investigation of the reasons to which a lawyer is invited, why they were given and why they were overruled.

An objection equally plausible may be started, that the learning is too exuberant. After citing forty-five cases to prove that the consideration to support an assumpsit must move from the plaintiff—must be such as he has the means of performing or causing to be performed—must not contravene any rule of the common law, the express provisions of any statute, or the general policy of the law, and must not be contaminated with any illegal transaction, the learned editor weighed down with forty-five cases, appears to have thought that he had bestowed his tediousness beyond all bounds of moderation, and adds, "see also the cases collected, *ante* vol. i. p. 309, b. c., note." (6) Armed for the task as patient re-

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viewers, we turned back with some misgiving to this erudite note, and found there comprised only forty-one more cases, and extracts from two statutes. It might be considered expedient to conceal the whole length of his ascent and toil from the student at starting, lest perceiving what Alps on Alps were to arise, he should lie down in despair. An impertinent doubt will perforce intrude, whether it is necessary to collect and bind together a fasciculus of all the cases that have ever been decided, when the subsequent decisions are pronounced on the authority of the preceding. The objection seems to some degree founded on a true principle of criticism, first applied by Bekker and Poppo, that the authority of a reading does not depend on the number of MSS., for if out of twenty MSS, agreeing in any reading, nineteen can be proved to have been copied from the twentieth, the reading does not rest on the authority of twenty, but of one. If the later decisions were indeed pronounced without assigning reasons, this crowding of the page with case on case would be open to just animadversion: but as a general rule, the authorities are examined and commented on, and some doctrine is suggested in the argument or judgment to which the student may usefully refer. This copiousness of citation, *l'embarras des richesses*, can scarcely be dispensed with at a time when more deference is paid to authority than to principle, nor can it be a good ground of complaint against an elementary work, that all the sources of information are pointed out. There may be, and doubtless is, mischief in this multiplication of reported cases, but for this admitted evil the editor of Williams's Saunders is not responsible. Approving of the plan of his work, we can bestow unqualified praise on its execution; the one being as free from inaccuracy as the other from real defect. None but those who have perused the present with the former editions in their hands, can adequately appreciate the care with which mistakes have been corrected, omissions supplied, references verified, new cases introduced, and doubtful points suggested for consideration.

We have minutely collated the first volume with one of the preceding editions in which, we believe, all the authorities are carefully noted up, and have ascertained very few omis-

sions ; errors and mistakes there are comparatively none. The few following additions might be made with advantage :

Page 28.—Unless limited, a plea is taken to be to the whole declaration. 3 Ad. & E. 699 ; 2 M. & W. 72.

Page 33.(a)—Trott v. Smith, 10 M. & W. 453, where a demand was held necessary.

Page 336.—“ Duly requested.” These cases should be noticed. Even after verdict the word “duly” will not supply the place of a material averment. Everard v. Paterson, 2 Marsh. 304, and Williams v. Germaine, 7 B. & C. 468.

Page 67.(b)—Note of Serjeant Williams, “ But it seems it is not necessary that the plaintiff should swear to the truth of the debt,” there should be added, 1 M. & G. contra.

Page 84.—To the note Vere v. Lord Cawdor and another, 11 East. 568, holden that a game-keeper could not justify killing a dog which was pursuing a hare in his lordship’s manor, add, see 1 & 2 Will. IV., c. 32, s. 10.

Page 103.(a)—Text. The court said that the replication in this case was well concluded, quod mirum videtur. The reporter’s wonder is now confirmed, see Thorne v. Jenkins, 12 M. & W. 614.

Page 154.—Add at the end of the note, As to an action for money obtained by fraud on a life policy, where the funds of the insurance society are invested in the names of the trustees, according to the trust deed, and they executed the policy, Lefevre v. Boyle, 3 B. & Adol. 877.

Page 228.—Where a plea states a parol agreement, it will not be intended that it was under seal. 2 M. & G. 405.

Page 236.—Add, It is necessary that a parol agreement between landlord and tenant, to determine the tenancy, should be acted upon in order to be effectual ; 2 Camp. 103, 2 Starkie, 379 ; 8 Taunt. 270. The landlord’s putting a bill in the window is not sufficient ; 3 Esp. 224.

Page 264, note (1).—It is held, that a consideration executed, and part, as in the present case, of the service performed by the plaintiff for the testator, in his life-time, for several years then past, is not sufficient to maintain an assumpsit, unless it was moved by a precedent request and so laid. To this sentence there might be added, “ Not so where the consideration is executory ;” 2 C. M. & R. 48.

Not necessary that a precedent request should be laid in all cases, e. g. an action for money lent; *Victors v. Davies*, 12 M. & W. 758.

Page 346.—Case of *Beadsworth v. Torkington*, 1 Q. B., 782. Since the Municipal Boundary Act it is a variance to claim the right for residents within the borough, instead of the ancient limits.

We have only discovered one reference to be wrong, at page 28. In the reference to *Chitty on Pleading*, vol. i., p. 511, it ought to be p. 453. The reference might now and then be more neatly put; at p. 57, where the statute 8 & 9 Will. III., c. 11, s. 8, is cited about summoning a jury *before the justices of assize*, and the note is added, see statute 3 & 4 Will. IV., c. 42, s. 16, *post*, p. 58 g. n. (i); instead of all these mystical letters, would it not be better and shorter to say at once, *before the sheriff*?

A clear and full index to the notes is given, which will be found in the exigencies of practice of extreme value, there is a mistake under the head of Bankrupt—Assignees of, where the author says, "Statute 2 & 3 Vict., c. 29, does not protect an execution on a judgment on a warrant of attorney." On referring to the statute it will be found that the execution is protected. It may be doubted whether the editor is not in error in the following note: "As to whether the simple fact of possession is *conclusive* evidence, and constitutes a complete title *in all cases* against a defendant, who is a mere wrongdoer, as it does in actions of trespass to real property, see 7 M. & W., 312, *Elliott v. Kemp*, per Parke, B."(a) The learned editor appears to have overlooked the case of *Brown v. Dawson*, 4 P. & D., 355, confirmed by the case of *Williams v. Hughes and others*, Trin. T., Q. B., not yet reported, that the simple fact of possession is not conclusive evidence of title, and that a mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects.

In the note upon *Convictions*, vol. i. 262 d, the following dictum is no longer law: "However, it has of late been

(a) Vol. ii, 47 f.

held, that if it appear on the conviction that the evidence was given on the *same day* that the defendant appeared and pleaded, the court will *presume* that it was given in *his presence*; 3 Burr., 1785, R. v. Aickin; In re Tordoft, Carrow's Sessions Cases, vol. i., p. 179. It is only a trifle, we confess, but as this is the work of a scholar, we hope to see Cam. Scacch. erased from the 7th edition, which will probably be soon called for. Instead of this gallipot Latin, if we are to have a dead language, let it be abacus or tabula lusoria, which would sound less harshly, and scarcely more pedantic—but better than all “Exchequer Chamber,” in good honest English.

These are the few defects—the scattered weeds in a large field—which a diligent search has enabled us to collect; and we shew them with the less scruple, as their want of importance, and fewness of number, lead irresistibly to the conviction that this is an excellent and most elaborate edition of an excellent work—a reprint of the great classic in pleading, auctior atque emendatior, alike worthy of the author and editor—deserving the very favourable reception it has met with from the profession, and rivalling the care, accuracy, and research which Mr. Vaughan Williams expended upon the Law of Executors.—*Law Magazine*.

THE UPPER CANADA JURIST.

HINTS AS TO THE EXAMINATION OF WITNESSES.

1. *Hints to Witnesses in Courts of Justice.* By a Barrister. London : 1825.
2. *Quintilian's Institutes of Oratory, Book 5, Chap. 7, concerning Witnesses ; containing his Rules for their judicious Examination and Cross Examination. Translated with notes, &c.* By William M. Best, Esq. of Gray's Inn, Barrister at Law. London, 1836.

THE treatment of some of the witnesses (neither the most reputable nor disinterested of mankind) at Courvoisier's trial, has been the means of giving shape, body and expression to a grievance, or supposed grievance, time immemorial sustained by the public at the hands of the practising members of the bar. Seldom, if ever, within our recollection or in our presence, has the effect of forensic habits on mind and manner been discussed, without some one expatiating on the recklessness with which counsel are wont to wound the feelings of witnesses, though the murmurs were neither general nor loud enough to justify us in volunteering either apology or reproof. At length, however, they had swelled into something very like an outcry, and it becomes necessary to consider whether the profession or their alleged victims are to blame.

The tracts named at the head of this article appear well calculated to throw light on this inquiry, and we have accordingly rescued them from the neglect and oblivion to which on their first appearance they were undeservedly condemned. The first is from the pen of Mr. Baron Field, now judge of the Vice-Admiralty Court of Gibraltar. The second is the chapter to which Blackstone alludes when he speaks of Quintilian as laying down "very good rules for the examination of witnesses *viva voce*."

Mr. Baron Field thinks that the annoyance experienced by witnesses is principally attributable to their own awk-

wardness, confusion, inaccuracy, and conceit; and it may be as well to consider, in the first instance, to what extent this opinion is founded upon truth.

He starts by roundly charging the public with a culpable degree of indifference and consequent inexperience regarding judicial proceedings :

“ Ever since it has been my lot to attend courts of justice, I have been of opinion, that he who would devote half an hour to the drawing up of a few *Hints to Witnesses*, who for the most part, have never been in a court of justice in their lives before, would save those courts a great deal of everlasting admonitory trouble, and would, in that regard, confer no small benefit upon the profession and the public. Whether it proceeds from the smallness and inconvenience of our courts of justice, or from a want of forensic curiosity, I know not ; but it is a fact, that in London particularly, nobody goes into a court of justice, unless he has business there. In Ireland, I am informed, the courts are frequently attended by all orders of the public, out of mere rational curiosity, and that it is rare to meet with an Irishman who cannot discuss the talents of the leading barristers. In England, when a man is subpoenaed as a witness, he generally has to make his *debut* in a court of justice; and the bar and the court are put to the never-ending and still-beginning trouble of drilling the witness into a testifying attitude, voice, and phrase ; half of which trouble might be saved, if people would but condescend to think they may pick up some useful information in a court of justice, and that there is more common sense in a trial at law than good men would suppose. This absenting themselves from courts of justice is in no case so apparent and flagrant, as when the public are called upon to serve as jurors. For an Englishman who is liable to act as a juror, never to have been in a court of justice before, (as I have seen many jurors who have not), is as monstrous as for a Christian never to have been in a church ; and I could mention many glaring instances of ignorance in such jurors of the very fundamental principles of the constitution and the dearest rights of Englishmen. If common jurors are taken from a class of society, from which education, and reading upon the subject of trial by jury, must not be expected, surely it cannot be too much to ask them to attend the courts now and then, and observe what will be expected of them when it shall come to their turn to act as jurors. This unusedness to be present in a court of justice is in nothing so palpable as in the total ignorance which witnesses betray

even of the forms of an oath, as to taking the book in their ungloved right hand and kissing it, or of addressing the judge, whom the vulgar and unhabituated generally call "Sir," instead of "My Lord,"—a mistake quite as ill-sounding and ill-bred as that of the poor ignorant country witness, who calls the barrister "your Lordship." But if witnesses will persist in refusing to go into court till they shall actually receive conduct-money thither, let them at least commute the trouble and time of such an attendance for the sum of one shilling in hand well and truly paid to my booksellers, before the delivery of these presents, and let them improve the few following well meant *Hints*."

The reason why English courts of justice are not attractive is obvious enough. The business is transacted in a quiet, matter-of-fact, unostentatious manner, with strict attention to the subject under discussion. There are no dramatic or melodramatic displays; no shedding of tears, no appeals to heaven, no premeditated bouts of sparring with witnesses. Even when a cause of the exciting order is set down for trial, it is hardly ever possible to ascertain beforehand when it will actually come on; and a matter of the highest moment, which has been a standard topic in the newspapers for weeks, may be disposed of, parenthetically as it were, by a mystical telegraphic communication between the bench and the bar, whilst an action for a grocer's bill is going off or one for a linendraper's coming on.

An Irishman lounges into a court of justice, partly out of sheer idleness, and partly from that affectation of dialectic cleverness which pre-eminently distinguishes him. He has the national character for quickness to support, and attends to take a lesson in repartee or blarney from his favourite "counsellor." But the advantage of the habit, as regards either the administration of justice or the individual, is problematical at best; and we believe it must be admitted, that the use to which an Irishman applies his practical knowledge in this walk, is not to tell a plain story without confusion, but to bother the examining counsel and elicit a roar from the galleries. With all due deference to the Vice Admiralty judge, we prefer the Englishman with his ill-breeding and hesitation—his ungloved hand and *Sir*—to the glibness, dexterity and unhesitating effrontery of Pat.

Mr. Field continues :

“I. And, first, I always said that if ever I published such a pamphlet as this, I would place in the very head and front of it, in capital letters, these words—‘SPEAK OUT LOUDLY.’ The experience of the whole bar will unite with me in saying, that the purposes of justice would be better furthered, if these words were even to displace the admonitions against bearing false witness, which are inscribed upon the walls of some of our courts of justice. There is no phrase so constantly in the mouths of both the bench and the bar as this; insomuch that if the courts find it necessary to employ an *usher* to command silence in the spectators, they ought also to employ a sort of *blowpipe* to insure audible utterance in the witness. This lowness of tone in witnesses does not arise so much from diffidence, as from an unusedness to pitch the voice for public speaking. Here is another of the evils of not previously attending the courts. If witnesses would do so, they would find that whispering, or even conversing, witnesses or no witnesses at all, and might, as the judges are irritated to say every day, *just as well stay at home*. Never having been in a court of justice before, a witness comes into the box as if the court were a private room; and when he is asked the first question, which would perhaps inquire into the nature of his Christian name or situation in life, bows and answers in a most well-bred whisper. Now his name and quality are doubtless exceedingly familiar to him; but unfortunately, the judge does not know the various branches and callings of all his numerous family, however ‘unknown’ it may ‘argue himself.’ And there are besides twelve gentlemen sitting at some distance, called a *jury*, who form a convenient (not to say a necessary) branch of our courts of judicature; and, as the counsel iterate all day long *these gentlemen must hear all that witnesses say*.”

A very useful suggestion, but by no means so easy of practical application as is supposed. A man or woman who has never had occasion to address a formal audience of any kind (and unless that lady belonged to the Society of Friends and had sometimes been moved by the spirit, one does not see how *she* should), is stuck up in an elevated box or pulpit, and expected to detail occurrences, or reply to a series of complicated inquiries, in the precise key and at the exact rate of utterance best adapted for twelve gentlemen in one part of the court to hear, and another gentleman in another part of the court to copy; though the art or habit of carrying on

a narration or train of thought in a loud evenly-pitched tone, is one of the grand attainments of rhetoric. Surely, if any thing beyond *yes* and *no* is required, those repeated injunctions to speak up must militate sadly against the main object, which we presume to be the elucidation of the truth. A witness may hesitate and even contradict himself, as Lord Listowell and Mr. Charles Ross blushed, from innocent embarrassment; and it is far more important to be able to watch the natural working of the features and inflexions of the voice, than to have a got-up statement clearly recited by an individual duly exercised in the most approved style of giving testimony, or be bawled at by some unhappy wight reduced by constant goading to the last stage of bewilderment.

We know full well the extent and provoking character of the inconvenience, but it is rather aggravated than alleviated by irritability; and if the witness, instead of being harshly rated at the commencement, were allowed a few moments to recover himself and get accustomed to the sound of his own voice, and were then told quietly that it was necessary to speak louder, the desired object would be much more frequently and much more satisfactorily obtained. Mr. Baron Field, however, will have it that the entire blame lies with the chief sufferers, and endeavours to account for their pertinacity on an hypothesis more ingenious than just.

“II. The great mistake of witnesses, and the chief cause of their not raising their voice above conversation-pitch, is that they will not impress their minds with the conviction that they are called upon to give their evidence as a matter of *business* only. The court does not sit for the *pleasure* of hearing them converse with the counsel, let the manner and matter of witnesses be ever so interesting. The witness should leave all his bows and undertones in the drawing-room, counting-house, or counter, from whence he came; and should consider himself, from the first moment of his entering the box, as the dictator of necessary and material evidence, to be recorded by the judge who presides at the trial; he should never for a moment suffer himself to forget that his lordship writes down every answer he gives; and therefore when he *bows* to the question, whether his name be John Nokes, instead of proclaiming that ‘it is’—what does he? Can his lordship hear a bow? or if he could, is he to record it among his notes by hieroglyphics? Really those who are to give a verdict upon

oath, according to the evidence, must have more than a bowing acquaintance with the facts of the cause."

Pleasure, indeed! We believe nineteen witnesses out of twenty would say with Lord Ellenborough, when an eminent conveyancer asked when it was their lordships' pleasure that he should proceed with his argument—"pleasure is altogether out of the question." They know very well that they are on serious business, and what is play to others is often death to them. Those bows and undertones generally betoken any thing but gratification or self-complacency.

But there is another bad consequence:

"Besides, if witnesses in courts of justice are suffered to degenerate into conversers with barristers, they will be apt to forget that they are testifying upon oath; and though their minds may be sufficiently upright to preserve them from direct falsehood, whether they are speaking upon their oath or not, yet when they are suffered to lose sight that they are bearing witness under a solemn engagement to tell 'the whole truth, and nothing but the truth,' and are permitted to descend into conversation, they will naturally argue, and fence, and colour, and conceal, and give way to bias, and blind themselves through interest. It is not in human nature, when off its guard of the sanction of a judicial oath, to refrain from these infirmities; and therefore it becomes important that the witness should never be suffered to forget himself for a moment by the slightest deviation from an audible tone of responsive deposition. If any proof were wanting of the truth of my remark, as to this conversational mistake of witnesses, I would adduce the phrases 'upon my *honour*,' and 'my dear sir,' which are often in their mouths, and which shew a complete forgetfulness that they are 'giving evidence' upon their *oaths*, and 'to the court and jury.'"

It is astonishing that so acute an observer, and generally just a thinker, as Mr. Field, should alloy his valuable suggestions by such fallacies. The inference drawn from the casual use of the phrase "upon my honour," is about as conclusive as that drawn by Bishop Thurlow from his brother's frequent appeals to the Redeemer when suffering from the gout, which he adduced as evidences of the chancellor's belief in Christianity. A strong interest, stimulus, or excitement of any kind, causes conventional forms to be forgotten or disregarded; and we should be the more inclined to believe a witness from his being hurried unconsciously into his habi-

tual tone, manner, and character. In the case of a made-up story, the only chance of eliciting the truth is to make the witness forget himself.

The next suggestion is one which cannot be too frequently impressed.

“III. If witnesses were never to permit themselves to indulge in this conversational style, they would not be so apt, upon adverse or cross-examination, to *fence*, as the practice is called at *the bar*: and one of the most serious and important assurances I would give them is, that they never will gain any thing for their cause or their credit by this practice. The court, the bar, and even the jury, are too well used to the artifices of witnesses to imposed upon for a single moment, by the most dexterous parrying in the world; and a fencing witness will injure his friend's case more by such demeanour than he will benefit it by all the partiality and reserve of his guarded and unwilling evidence. The court and jury have at least enough of common sense and knowledge of the world to make due deduction from the credit of such a witness; for long experience of the value of *viva voce* testimony has taught them that the *manner* of witnesses is often more important than the *matter*; and their demeanour is always justly taken into consideration and appreciated in estimating their credibility, upon which it is, and not upon the mere strength and extent of their swearing, as it appears upon paper, that the verdict of the jury depends. A witness cannot therefore more effectually damn a friend's case than by *costiveness*, as it is expressively called, and pugnacity on the one hand, or by eagerness and overleaping on the other. I remember seeing a pert woman overthrow a whole pile of evidence by a flippant snappishness of the former kind—a fighting with every question; and she flounced about, and looked round for applause at the end of every retort, till Lord Ellinborough told her ‘not to throw herself about as if she was in estimation, for there was nobody admiring her.’ ”

Almost the only recorded instance in which pertness and flippancy met with any positive success or applause, was during the inquiry of the alleged malversations of the late Duke of York as commander-in-chief, when the notorious Mary Ann Clarke played off a succession of airs and impertinencies to the amusement of the younger members, and the occasional confusion of her interrogators.

Courts of justice, however, are constituted very differently from popular assemblies, and a pert flippant witness is pretty

sure to throw discredit on the cause—much more what Mr. Field calls a fencing witness, who generally combines dishonesty with conceit. Provincial wits, male and female, are carefully to be eschewed, and we should think little of an attorney's discretion who should insert one of them, without an emphatic note of caution, in a brief. Mr. Field gives a specimen :

“As an example of the latter species of evidence, I would adduce a witness in a horse cause, to prove that the horse was not injured, who frisked into the box, and before there was time to administer the oath to him, repelled the dignity of being called a veterinary surgeon, by rapping out—‘I'm not one of your ranting, flaunting, flaring, harum scarum tearum fellows : I'm one of the old school, taught by nature and experience. The horse is not a glass of gin the worse.’ The noble and learned judge here rebuked him for talking of glasses of gin. The witness changed his expression—‘I tell you he is not a drop the worse.’ Sir William Garrow then examined him—‘You are one of the old school?’ *Witness*—‘Yes ; I've known you a long time.’

“Of this damning kind are witnesses who prove *too much* ; for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort : he leads the witness on from one extravagant assertion in his friend's behalf to another ; and, instead of designing him to mitigate, presses him to aggravate his partiality, till at last he leaves him in the mire of some monstrous contradiction to the common sense and experience of the court and jury ; and this the advocate knows will deprive his whole testimony of credit in their minds. Such is all that witnesses gain by partiality, by favour and affection, and by combating with truth. He who is not *for* truth is *against* it, and against him will the belief of the jury be shut.”

Witnesses of this sort often do an infinity of mischief to the cause, by speculating on the drift of the question or the effect of the answer, which they will then modify in such a manner as, in their opinion, the circumstances may require.

Mr. Field says that the reason most witnesses give their evidence in so slovenly a manner is, that they will not apply their minds to the matter in question, and he seems to think that a good deal of their listlessness and indifference might be cured by making it worth their while to attend. They receive little or no remuneration, and the consciousness of having

done their duty is hardly strong enough to compensate for the sacrifice of time and comfort.

“ This is a very unpatriotic feeling ; and the evil to which it gives birth should be remedied (wherever it can) by a previous examination of his witnesses, on the part of the attorney in the cause. Here is the reason why women and children are so much better witnesses than men : they are seldom called upon to act as such, and business is a rarer thing to them : they, therefore, (particularly children) have a vaster idea of its, and consequently of their importance ; and they shall have recalled to mind all the circumstances of their testimony, and shall have ruminated upon what they shall depose, long before they come into court. This is no more than what every witness ought to do ; and such a preparation would greatly conduce to the better administration and dispatch of justice.”

The truth is, most of the particulars to which witnesses are called to speak make no impression at the time, and the wonder generally is, not that they recollect so little, but that they recollect so much. Moreover, clearness of perception is a very rare quality ; and both dates and facts have a strange tendency to mingle and get confounded in the minds of most of us.

Children are good witnesses, because they speak *without* premeditation. Women are not good witnesses, except on topics coming peculiarly within their own sphere of observation ; for they do not live and act under the same habitual responsibility for the truth of their statements as men, who are liable at all time to be called to a severe account for an inaccuracy. The author of “ The Adventures of an Attorney ” agrees with us in both these points : “ Of all witnesses in an honest cause, an intelligent child is the best ; of all witnesses in any cause, a woman is the worst, unless she happens to be very pretty and engaging, for then she will answer the purpose, whatever it be, most successfully.”

Mr. Field repeats the often repeated caution to witnesses,

“ Don't tell us, Sir, what he told you.”(a)

But as none are more apt to transgress the rule than professional witnesses, it is clear that the transgression is not the result of ignorance, but the perhaps inevitable conse-

(a) The Pleader's Guide.

quence of men carrying their ordinary modes of expression into the witness box.

The constant war which both judge and counsel are compelled to wage against this habit, not unfrequently presents itself in a ludicrous point of view, to the lay spectator, and few of the jokes in *Pickwick* have told better than his caricature of Mr. Justice Starleigh correcting Sam Weller.

"Now, Mr. Weller," said Serjeant Buzfuz.

"Now, Sir," replied Sam.

"I believe you are in the service of Mr. *Pickwick*, the defendant of this case. Speak up, if you please, Mr. Weller."

"I mean to speak up, Sir," replied Sam; "I am in the service o' that 'ere gen'l'man, and a very good service it is."

"Little to do, and plenty to get, I suppose?" said Serjeant Buzfuz, with jocularity.

"O quite enough to get, Sir, as the soldier said ven they ordered him three hundred and fifty lashes," replied Sam.

"You must not tell us what the soldier or any other man said, Sir," interposed the judge, "it's not evidence."

"Wery good, my Lord," replied Sam!

(To be Continued.)

POINTS IN PLEADING AND PRACTICE.

NO. V.—AIDER AND AMENDMENT OF DEFECTIVE PLEADINGS.

The case of *Beasley qui tam v. Cahill*, in which judgment was arrested by the Court of Queen's Bench last term, in an action on the statute of Henry the Eighth, against buying disputed titles, and in which it was strenuously argued, that the defects which were alleged against the declaration, were not of a nature to prevail after verdict, has called our attention to the subject of aider of defective proceedings, a subject which is of considerable importance to every pleader and practitioner as any step in a cause, from the declaration to the writ of error, may be more or less affected by it. Aider must not be confounded with *amendment*; the latter is a permission given by the court out of favour, to alter and amend in pleading some-

thing that is admitted to be defective or erroneous. Aider on the contrary is not *ex gratia*, but is an assistance, by custom and inference, granted *ex debito iustitiæ* to pleadings, which, if rigidly construed, would be held imperfect.

There are two kinds of aider, by common law, and by statute. Aider at common law, was, first by the original writ; secondly, by pleading over; and thirdly, by verdict.

First, Aider by the original writ, was where a declaration contained an imperfect statement of the nature of the action, which, however, appeared correctly described in the original writ, which was recited in the beginning of the declaration, and regarded as part of it. Thus, in an action of trespass, where the declaration omitted to state the offence to have been committed "*vi et armis*," the presence of these words in the recital of the original writ was held to supply the deficiency.^(a) But, as it is no longer usual or necessary thus formally to recite the original writ in the declaration, this mode of aider is virtually abolished.

Secondly, Aider by pleading over. It is a well known principle of pleading, that each party is required to put his case on the record with clearness and precision. *Verba fortius accipiuntur contra proferentem*; and, generally speaking, omissions and imperfections are not to be supplied by inference or intendment in favor of the party pleading. But as the only object in establishing this rule was, to elicit the precise point in dispute from the conflicting statements of the parties, so as to be able to refer it to the proper mode of trial, and as of course it is a matter of indifference to the tribunal how that point is ascertained, so as it is ascertained, the rule in question has received a qualification, and many pleadings or statements, which would be held imperfect if objected to on demurrer, are cured or aided, if the opposite party instead of demurring, replies in such a manner as to render the meaning of the former pleading clear and intelligible; the imperfection or omission in which is thus ratified, as it were, by the self acting power of the pleadings alone.^(b) In furtherance of this

(a) Com. Dig. Pleader, c. 12, 86.

(b) Com. Dig. Pleader, c. 85, E. 37; Co. Lit. 303, b; Stephen. Pl. 159; 1 Chit. Pl. 671, 6 Ed.

principle, it has been established as a rule, that all defects of mere form, and such as could not be taken advantage of on general demurrer, are cured by pleading over.^(a) But it is not easy to say how far this principle extends when the fault in the pleading is of a substantial kind. In *Banham's case*,^(b) Lord Coke expressly lays it down, that "when a declaration wants time or place, or other circumstance, it may be made good by the bar; so of the bar, replication, &c.; but that when the declaration wants substance, no bar can make it good; so of the bar, replication &c.; e. g., the defendant pleads agreement, but does not shew satisfaction: the replication denies the agreement, this does not aid the bar;" and he cites several cases from the year books in support of his position. So in *Badcock v. Atkins*,^(c) which was an action of slander for saying, "Thy father (innuendo the plaintiff) hath stolen six sheep;" but the declaration neither stated that they were spoken to the plaintiff's son, nor that the plaintiff's son was present at the speaking: it was held not to be aided by a plea in justification put in by the defendant, and this on the ground that a declaration deficient in substance cannot be aided by the plea, and there are several other cases in the books to the like effect.^(d)

These authorities, however, only shew, that when the first pleading is essentially faulty, and the second only *impliedly*, and by inference admits the case sought to be established by it, but that even taken both together, they do not shew on the face of the record a complete cause of action or ground of defence (as the case may be) in the party pleading, the doctrine of *aider* cannot apply. Thus in *Bonham's case*, where the fault in the plea was the shewing award without satisfaction, which is no defence at all, the traverse of the award does not shew (otherwise than by a rather violent inference) that there ever was any satisfaction: and consequently there is no defence developed on the record. But it is a very different matter where the second pleading expressly puts on the record the fact omitted by the opposite party. Thus for instance, in an action for taking a hook, where the plaintiff

(a) 3 Wils. 297; 2 Salk. 519; 8 Co. 120, b; 6 Mod. 136; Bac. Ab. Pleas, &c.

(b) 8 Coke, 120, b.

(c) Cro. El. 416.

(d) Butt's case, 7 Coke, 25.

omitted to state in the declaration that it was *his hook*, or even that it was in his possession at the time, and the defendant on plea justified the taking the hook *out of the plaintiff's hand*, the declaration was held to be aided by the plea.(a) And if a deed be incorrectly set forth in the declaration, the fault is cured by the defendant's setting out the deed on oyer, and pleading *non est factum*.(b) From these and similar cases, the best modern authorities consider the true rule to be, that a defect in substance cannot be cured by pleading over, when the subsequent pleading only aids the defect by implication; but that when it expressly states the fact, which ought to have been alleged by the adversary, it is otherwise.

Thirdly, Aider by verdict is another mode of aider known to the common law. This seems properly a branch of the doctrine of legal presumption, and belongs to that class called by Mr. Starkie "presumptiones juris et de jure," or presumptions of mere law.(c) Its meaning is strictly this, that after a verdict has been given by a jury, the law in order to support their finding, will presume many statements of matters, which are imperfect on the face of the record, to have been duly corrected and rendered complete by proof at the trial. The principle on which this description of aider is founded, cannot be better expressed than in the clear and forcible language of Serjeant Williams,(d) which has been quoted with approbation by Stephen, in his work on pleading.(e) "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required proof on the trial, of the facts so defectively or informally stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given the verdict such defect, imperfection or omission is cured by the verdict." The extent of this rule is also well described in the case of *Jackson v. Pesked*;(f) "when a matter is so essentially necessary to

(a) 1 Sid. 184; Steph. Pl. 159.

(c) 3 Stark. Ev. 1241.

(e) Page 161.

(b) 1 Chit. Pl. 433, 673.

(d) 1 Wm. Saund. 228, a n l.

(f) 1 M. & S. 234.

be proved, that had it not been given in evidence the jury could not have given such a verdict, then the want of stating that matter in express terms in a declaration, providing it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must in fair construction so far require to be restricted, that no judge and no jury could properly have treated it in an unrestricted sense, it may reasonably be presumed after verdict, that it was so restrained at the trial." And in *Hitchins v. Stevens*,^(a) it is said, "Whensoever it may be presumed that anything must of necessity be given in evidence, the want of mentioning it on the record will not vitiate it after verdict."

These descriptions contain within them all the rules and all the exceptions on the subject. The defective matter must be such, that its correction by proof may be implied by *fair and reasonable intendment*,^(b) from the allegations on the record, coupled with the verdict. The issue and the verdict together are to be regarded, and from their *united* effect the intendment - rises. The *issue* must be looked at, because it is not necessary that anything should be proved, unless it be expressly stated on the record, or be necessarily implied from the facts which are stated;^(c) the *verdict* must be taken into consideration, because it must have been given for the party in whose favour the presumption is raised; for it is in consequence of such verdict, and in order to support it, that the court puts so liberal a construction on the allegations contained on the record. The cases in illustration of these principles range themselves under the following heads:^(d)

1. *Omission* of that which was necessary to be proved, or the party could not have recovered, is aided by verdict;^(e) or, in other words, if the substance of the action be alleged, the omission of the necessary incidents to that substance will not vitiate. A few instances will illustrate this. In an action of debt for rent by the grantee of a reversion, no attornment was alleged, but it was resolved good after verdict; *for, if the*

(a) *T. Raym.* 487

(b) 1 M. & S. 237; 1 T. R. 145; 1 Chit Pl. 673. (c) *Ibit.*

(d) See the cases collected in Com. Dig. Pleader, C. 87, E. 38; 1 Saund. 228, a., n. 1; 1 Chit. Pl. 673; Sheph. 160, n. f.

(e) 4 Burr. 2018; 2 Shaw, 233; 1 Salk. 365.

plaintiff had not given attonement in evidence, he would have been nonsuited.(a) So, if the grant of a reservation or other hereditament, which lies *in grant*, he pleaded, without alleging that such grant was made *by deed*, the imperfection is cured by the verdict finding that the grant was made.(b) So where a feoffment is pleaded, but no mention is made of livery, it would be implied after verdict, “*because it makes a necessary part of a feoffment.*” If the plea to a declaration on a bill of exchange state that there was no consideration given, but without shewing the circumstances with particularity, the defect is aided after verdict.(c)

2. Surplusage and repugnancy are thus cured ;(d) as if the plaintiff declare in trover that, on the 4th of March, he was possessed of goods, and that *after, viz., on the 1st of March*, they came to the defendant’s hands, the latter date will be rejected.

3. Ambiguous and informal expressions are also aided, and must afterwards be taken to have been used in that sense which will sustain the verdict. Thus, where in trover a declaration was for goods, chattels and *fixtures* (enumerating merely moveable articles), general damages having been assessed on the whole declaration, it was held that the word “*fixtures*” would not necessarily be taken to mean things affixed to the freehold ; for, by Parke, B., “the verdict having been found generally, we must intend them to have been fixtures attached to other things, which were in themselves moveable”—*Sheen v. Rickie.*(e) And the same point, in an action of trespass, has been lately adjudged in the Court of Queen’s Bench, here in the case of *Meyers v. Marsh*—not yet reported. So in libel, where one of the paragraphs complained of ran thus :—“We again assert the cases formerly put by us on record : we assert them against A. S. and A. H. (the plaintiff), and they are such as no gentleman or no honest man could resort to ;” it was held, after verdict for the plaintiff, that these words imputed a charge of misconduct against the plaintiff, and not merely an assertion in contradiction of him—*Hughes*

(a) T. Raym. 487.

(b) 4 Tyr. 472.

(c) 5 M. & W. 175.

(b) 1 Saund, 228, a., n. 1.

(d) Bull N. P. 321 ; Cro. Jac. 96 ; 4 B. & Ad. 739.

v. Rees.(a) The limits and qualifications of the general rule of which we have been treating next demand our attention. Where there is no room for a fair and reasonable intendment from the verdict and issue, the defect of course will not be cured; and this is the case in the following instances:

1. Where the *gist of the action* is omitted, or is defective in itself. A *defective statement* of title may be aided; but a statement of a *defective title*, or the *omission* of title, is always fatal.(b) Where a party states the cause of action inaccurately, it is a fair presumption, after verdict, that it was duly proved; because, to entitle him to recover, all circumstances necessary in form or substance to complete it must be proved at the trial; but where he totally omits it, there is no ground for presumption, as he need not prove it at the trial.(c) Thus, in an action on the case, brought by one entitled to the reversion of a yard and well, to which the declaration stated an injury to have been committed, but omitted to allege that the *reversion* was in fact prejudiced, or to shew any grievance which in its nature would necessarily prejudice the reversion, the court arrested the judgment after a verdict had been given for the plaintiff.(d) So in an action for keeping a mischievous bull, where there was no *scienter* alleged in the declaration, judgment was arrested, the court observing they could not intend its proof at the trial, for the plaintiff need not prove more than was in his declaration—*Buxendin v. Sharp*.(e) And in our Court of Queen's Bench, where an action was brought for a malicious arrest, made under the old law, but after the union of the Upper and Lower Provinces; and the plaintiff averred that the defendant not having any reasonable or probable cause to be apprehensive that the plaintiff would leave the province of *Canada* without satisfying his debt, made the affidavit and arrest, the judgment was arrested after verdict for the plaintiff, because it was a sufficient justification for the defendant, if he was apprehensive that the plaintiff would

(a) 4 M. & W., 204.

(b) 1 Saund., 228, n. 1; Sheph. Pl., 161; 1 Chit. Pl. 681; 3 T. R., 25; 1 M. & S., 236; 4 B. & Al., 655; 2 T. R., 470; 4 B. & C., 555; 1 T. R., 141-146; 4 T. R., 472; 2 N. & P., 114; 5 M. & W., 233; Cowp., 826; Salk., 360; 2 Doug., 683; 2 Burr., 1159; 3 Wils., 275.

(c) 2 Doug., 683.

(d) 1 M. & S., 234.

(e) Salk., 662.

leave *Upper Canada*, and under his declaration the plaintiff was not bound to prove more than he had alleged. (a) So, in the same court, in a *qui tam* action, under the 32nd Hen. VIII., ch. 32, against the purchaser of an alleged pretended title, the declaration was held bad in arrest of judgment, because there was no *scienter* alleged on the part of the defendant of the want of possession for a year next before the bargain made, of the seller or any of them, under whom she claimed, according to the exception in the statute, although it was alleged that the right was a pretended right, and that the defendant knew it. (b) If, in an action on a bill of exchange, demand on and refusal by drawee, or notice of nonpayment (when such averment is necessary), be omitted, it is fatal after verdict. (c) So in an action against an heir, on the bond of his ancestor, if the declaration omit to state that the ancestor in his bond bound himself and *his heirs*, the omission is not cured by verdict. (d) Also, in *assumpsit*, if the promise alleged does not appear to be made on good consideration, it shall not be aided. (e)

2. The court, in order to support a verdict, will never make an intendment which is *inconsistent* with the allegations in the record; (f) or, in other words, if the verdict falsify the pleading, no presumption will be raised in its favour. Thus, in *conspiracy*, if it find all but *one* not guilty; (g) or, if a declaration expressly shew that a condition precedent was *not* performed by plaintiff, and state matter which is no excuse for the non-performance, it will be bad after verdict. (h)

3. When the imperfection or omission, though in form only, is in some *collateral* part of the pleading, that was not in issue between the parties, so that there is no room to presume that the defect was supplied by proof, a verdict does not aid it at common law, but it would almost in every instance be aided now by the statutes of *jeofails*.

Such was the extent of the doctrine of *aider* at common law, but it was soon found very insufficient to prevent justice

(a) *Thompson v. Garrison*, Easter, 5 Vic.

(b) *Beasley qui tam v. Cahill*, not yet reported.

(c) Doug. 679; 7 B. & C. 468.

(e) 1 Salk. 364.

(g) 1 Saund. 230.

(d) 2 Saund. 136, 137, a.

(f) 3 T. R. 17, 25, 26; 6 T. R. 710.

(h) 6 T. R. 710.

being defeated by objections of form. Its defects were principally these: 1st, Although all errors of mere form were held to be aided by pleading over, still objections which now would be deemed matters of form, were by the pleaders and courts in those days considered matters of substance, and consequently not aided. 2nd, Errors in a pleading were not aided when the adversary demurred: that is, objections of form might, on demurrer, be taken to previous pleadings on the record, and the justice of the case perhaps utterly defeated. 3rd, The doctrines of aider by pleading over, or by verdict, were manifestly inapplicable where judgment had been allowed to go by default. 4th, Assuming the pleading and record to have been originally drawn up correctly, the whole was liable to be defeated by errors or misprisions of the clerk or officer in transcribing the pleadings. In order to remedy these evils, numerous statutes have been passed from time to time, and which are known by the name of the Statutes of Amendments or Jeofails, the latter word being derived from the French *J'ay faillé*, and was an expression used by the pleader of former days, when he perceived a slip in his proceedings. These statutes have all been expressly introduced into Upper Canada, by the 24th section of the 2d Geo. IV. ch. 1, commonly called the King's Bench Act, and are as follows: 14 Ed. III. ch. 6; 6 Hen V. ch. 4; 4 Hen. VI. ch. 3; 8 Hen. VI. ch. 12, 15; 32 Hen. VIII. ch. 30; 18 Eliz. ch. 14; 27 Eliz. ch. 5; 21 Jac. I. ch. 13; 16 & 17 Car. II. ch. 8; 4 & 5 Anne, ch. 16; 9 Anne, ch. 20; 5 Geo. I. ch. 13. The effect of these statutes is to be considered after general demurrer, and after verdict. 1st, After general demurrer: By stat. 37 Elix. ch. 5, after demurrer joined and entered in any action or suit in any court of record, the judges shall give judgment as the very right of the cause and matter in law shall appear unto them, without regard to *any imperfection, defect or want of form, in any writ, return, plaint, declaration or other pleading, process or cause of proceeding whatsoever*, except those only which the party demurring shall *specially and particularly* set down. The chief difficulty that arose on this statute was, the distinguishing between matters of form and substance; and many defects which are now deemed to

be mere form, were then held not to be aided by the statute, such as the omission of "*vi et armis*," &c. To remedy this, the statute 4 & 5 Anne, ch. 16, directs, that after demurrer joined in any court of record, the judges shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission or defect in any writ, return, plaint, declaration, and other pleading, process or cause of proceeding whatever, except those only which the party demurring shall specially and particularly set down as causes of the same; notwithstanding such imperfection, &c. might heretofore be taken as matter of substance, and not aided by 27 Eliz., so as sufficient matter appear on the pleadings, on which the court may give judgment according to the very right of the cause; also, no exception shall be taken for an immaterial traverse, default of pledges, &c. or default of alleging the bringing into court any deed, &c., mentioned in the pleadings, or any letters testamentary, &c., for omission of *vie et armis* and *contra pacem*, for want of *hoc paratus est verificare*, or *per recordum*, or of *prout patet per recordum*, but the court shall give judgment without regarding such imperfections &c., except the same shall be *specially* set down and shewn for cause of demurre. The provisions of this statute are extended to proceedings on *penal statutes*, by 4 Geo. II. ch. 26, sec. 4.

2nd, After verdict: The statutory provisions on this head are well stated in Chitty's Pleading, (a) "Judgment shall not be stayed or reversed by reason of any *mispleading*, lack of colour, *insufficient pleading* or *jeofail*, or other default or negligence of the parties, their counsellors or attornies, *want of form* in any writ, declaration, plaint, bill, suit or demand, lack of averment of any life, so as the person be proved to be alive, *want of any profert* or omission of *vi et armis* or *contra pacem*, mistaking the christian or surname of either party sums, day, month or year, in any pleading, being right in any writ, plaint, roll or record preceding, or in the same roll or record wherein the same is committed to which the *plaintiff* (or more properly the *defendant*) might have demurred, and

(a) 1 vol. 682.

have shewn the same for cause; want of averment of *hoc est paratus verificare* or (*idem*) *per recordum*, or for not alleging *prout patet per recordum*, or want of a right venue, so as the cause were tried by a jury of the proper county where the action is laid, or *any other matters of a like nature not being against the right of the matter of the suit, nor whereby the issue or trial is altered.*"

These statutes are by 4 & 5 Anne, ch. 16, sec. 2, extended to judgments entered upon confession, *nil dicit* or *non sum informatus*. On the statutes of amendments and jeofails generally, it is right to remark, 1st, that no defect in substance whatever is cured by any of the latter, (a) although, if it arose from the misprision of the clerk, it might come under the provisions of some of the former. 2nd, That although an *informal* issue will be aided by the statutes, yet an *immaterial* issue is still fatal; (b) for if the issue is immaterial, so must be the verdict. In such cases the proper course is, to move for a repleader. (c)

The whole of the law on this important subject may be thus summed up;—

1. All merely *formal* defects are aided at common law, either by pleading over, or by verdict; and under the statutes of jeofails, either by verdict general demurrer, or suffering judgment to go by default, &c.; so that now no merely formal defect can be made a ground of objection after verdict.

2. Defects of *substance* are in general fatal, subject to the following exceptions: first, an error of substance may be aided by pleading over, when the subsequent pleading *expressly*, and not by inference, puts on the record the fact necessary to render the defective pleading good; secondly, by verdict, when the defective part does not form the very gist of the action, and is not in a matter collateral to the issue, and when the making the intendment is not inconsistent with the record, or the finding of the jury; thirdly, when the error has arisen from the mistake or misprision of the clerk.

(a) Doug. 63; Cro. Car. 13.

(b) 2 Saund. 319, e. n. 6; 2 Chit. Pl. 654

(c) Steph. Pl. 108.

MARRIAGE DE JURE AND DE FACTO.

1. DALRYMPLE V. DALRYMPLE, 2 Hag. C. R. 54.
2. THE QUEEN V. MILLIS, 10 Cla. & Fin. 534.
3. CATHERWOOD V. CASLON, 13 M. & W. 261.

The three cases which we have placed at the head of the present article, exhibit as singular an instance of fluctuation in legal opinions, as our judicial history has ever witnessed. In the first, we see a doctrine asserted by a judge, whom the Lord Chancellor as proclaimed "the most learned ecclesiastical lawyer of his age." The doctrine is accepted and maintained, for thirty years, by a succession of the brightest ornaments of the bench and bar, temporal as well as spiritual; when, lo! in the second case, we find it dividing the legal oracles of the House of Lords: and in the third the Court of Exchequer feels bound to repudiate it altogether.

The point, on which these very eminent and learned persons have differed, is whether or not, by the common law of England, the presence of an *episcopally* ordained minister be essential to the validity of a marriage. It is not now essential in England by statute; but the statutes of this class (with some special exceptions) do not extend to *marriages contracted on or beyond the seas*. Such marriages it has been held, if valid by the law of the place of contract, are valid by the law of England. But there are thousands of Her Majesty's subjects, of all ranks and degrees, now living, whose marriages, or those of their parents, were contracted where there was either no ascertainable law in force, or none but the common law of England, and where the ministration of an episcopally ordained minister could not be had, or if attainable would have been refused by the parties being members of the Church of Scotland or other Protestant dissenters. Weighty, indeed, must be the judgments, which would brand as concubines the pure-minded women, who have for years trusted to the sanctity of unions so formed; and would stamp bastardy with all its legal incapacities, on their innocent and unsuspecting offspring! If such be indeed the existing law of England, it is a dis-

grace to the age, and should be altered without a moment's delay. If it be not the law, as little time should be lost in clearing up doubts, which must cause grievous pain to susceptible minds.

It is admitted, on all hands, that the solution of the problem in question is only to be found in the history of the law, and accordingly most praiseworthy industry has been exercised, in exploring the receptacles of legal relics, and dragging forth from the dust of ages the long-forgotten monuments of barbarous legislation,—“*Juvabit*,” says Bacon, “*etiam antiquitates legum invisere; non abs re fuerit legum præteritarum mutationes et series consulere et inspicere.*” Far be it from us to reprobate the philosophy of this 86th aphorism! But, alas! the *history of the law* forms amongst us, at the present day, no part of legal education! It is otherwise on the continent. In the universities of Paris, Berlin, Gottingen, Heidelberg, Jena, Tubingen, Leisipic, Erlangen, Bonn, Friburg, &c. &c. special courses of lectures are given on the history of law in general, on the history of law universal and comparative, on the history of the Roman law, on the history of the French law, on the history of the German law, on the history of the European constitutional law, on the history of judicial laws, and, in short, on almost every branch of juridical history. Deprived of such aids, we must find our way, as well as we can, through the “mutations and series” of our by-gone laws; ever remembering, that all great changes in the constitution of society, or in the frame and tendencies of the public mind, infallibly draw after them corresponding modifications of the national jurisprudence.

Before we attempt, however, to investigate any problem, we must clearly understand its terms. If we would decide on the validity of a marriage, we must first know what the word “marriage” means. A familiar household word, no doubt it is: and yet it is used in many different significations. In ancient Rome, there were no less than three different kinds of marriages—*Confarreatio*, *Coemptio* and *Usus*, with reference respectively to the religious, the civil, and the natural bond of union. So among the Jews, there were the *Pactionis libellus*, the *Nummuli actio* and the *Coitus*. Again, marriage in Turkey admits of polygamy. The law of Scotland considers

marriage to be a contract purely *civil*: the Church of England deems it a *spiritual* act: and the Church of Rome entitles it a *sacrament*. If in argument the major proposition relate to one of these significations, and the minor to another, the conclusion must needs be illogical.

Now, there is a most important distinction in our own law-books, namely, that between marriage *de jure*, and marriage *de facto*. This we shall here endeavour to elucidate; because we think it will serve to reconcile authorities, which have been deemed contradictory; and because the distinction seems, at times, to have been lost sight of, in arguments of great consideration and solemnity. Marriage *de jure* is, in our understanding of the term, strictly and properly an act which, according to the law and practice of courts competent to decide on its legal validity, is held *conclusively* to bind a man and woman to each other as husband and wife. Marriage *de facto*, as distinguished from marriage *de jure*, is, in our apprehension, an act which, according to the law and practice of courts competent to decide on it, as a matter of fact, is held *primâ facie* to bind the parties together as married persons, until otherwise determined by lawful authority. Judgments on marriage, considered in this latter aspect, are, it is manifest, of an interlocutory character, in their origin; though circumstances, which will be explained in the sequel, may give them (as the civilians say) "the force and effect of a definitive sentence in writing."

The great and frequent changes of opinion, which, in the lapse of ages, the public mind of England has undergone, in regard to the sanctity and civil importance of the matrimonial union, account, in some degree, for that confusion and uncertainty, in which the laws concerning marriage have of late appeared to be enveloped. The only way, to find a clue to this labyrinth, is to begin with the earliest *distinct* traces of the matrimonial jurisdiction, and follow with caution the changes which it underwent. We say emphatically the *distinct* traces; for we mean at once to discard two vague clauses in ordinances ascribed to Edmund, a Saxon king, and Lanfranc a Norman archbishop, which are alleged to have rendered the blessing of a priest essential to the validity of a marriage, in

the 10th or 11th century. The authenticity of these obscure fragments of legislation is altogether doubtful: and in a pamphlet, which appeared pending the discussions in Millis's case,^(a) it was shown, that if genuine, they prove nothing as to the essential validity of the marriage bond, at any time; that whatever they prove, they are not known to have been ever received as law, in any court; and that if so received before the 13th century, the effect now ascribed to them was, from that time, directly contrary to the law and practice of the only courts competent to entertain the question.

The pamphlet just mentioned, proves that the foundations of the matrimonial law of England, as it has existed for seven or eight centuries, were laid in the establishment of the Ecclesiastical Courts by William the Conqueror; and it reviews the history of those courts, so far as regards the jurisdiction of marriage. Of this survey we shall give a brief sketch; but shall divide it, with a view to our present inquiry, into *five* periods, beginning respectively with the establishment of the courts,—the formation of a body of laws for their guidance,—the Reformation,—the Toleration Act,—and the Marriage Act of 1753.

I. By a mandate of the year 1085, William removed the Bishops from the civil courts, and gave them in England, as they had long before enjoyed on the continent, an exclusive jurisdiction in *spiritual* concerns, among which marriage then held an undisputed eminence. During the whole of the first period, therefore, marriage *de jure* was exclusively under the ecclesiastical jurisdiction. In what way marriage *de facto* was then considered, does not distinctly appear; but we may reasonably conclude, that the limits between the two jurisdictions were much the same as we find them in the age immediately succeeding.

II. The second period began about the middle of the twelfth century, when the canon law received a systematic form in the *decretum* of the monk Gratian, as the common law to a certain extent did, in the treatise of Glanvil. In the fol-

(a) A letter to Lord Brougham, on the opinions of the judges in the Irish marriage cases, by Sir J. Stoddart, LL.D. &c. 1844.

lowing century appeared the authoritative *Decretals* of Pope Gregory IX., and the valuable productions of Bracton and Fleta, and from these sources we have a clear view of the matrimonial jurisdiction in both its branches, *de jure* and *de facto*.

First, as to marriage *de jure*. The key to all difficulty, on this subject, is to be found in the religious opinions of an age eminently, and (as we now think) blindly religious. The Ecclesiastical Court was not a court of the king, or of the civil state : it was "*Curia Christianitatis*," the court of the Christian community, governed by the bishop as spiritual pastor, with an ultimate appeal to the bishop of bishops, the pope." The law of the court was not "The King's Ecclesiastical Law" (a phrase invented by the servile parliament of Henry VIII.)—it was "the Law of Holy Church," set forth, not in statutes of kings or parliaments, but in decrees of popes, and canons of councils, and these again resting on the doctrines of theologians. Now, the great leading doctrine of the theologians of that day was, that *marriage was a sacrament*, which it is still held to be by all Roman Catholics. In the 13th century, this doctrine was received, as a matter of *faith*, by the whole community ; the necessary consequence of which was, that the existence and validity of a marriage could only be determined by the law of the church : and accordingly we find Archbishop Arundel, in 1408, expressly denouncing it as *heresy* to hold any doctrine concerning marriage contrary to the law of the church, "*as set forth in the decretum and decretals*;" the punishment of heresy, on relapse, being at that time, to be *burnt alive*.(a)

The law of the Church, "as set forth in the decretum and decretals," was, that "marriage is contracted by consent alone"—"that solemnities ought to be observed, but are not of the substance of marriage"—and that "though they be not observed, still the marriage holds good."(b) The church, indeed, from the earliest times reprobated unsolemn marriages in the strongest terms : it represented them as, morally speaking, no better than fornication or adultery ; but it

(a) Stat. 2 Hen. IV. ch. 15.

(b) Decretal, 4. 1. 1. &c. &c.

thought that those, whom God had joined together, man could not put asunder; and therefore, far from even pronouncing them null and void, when once contracted by competent persons, it held them valid, to the full extent of voiding a subsequent marriage with another person, though the first had been quite secret, and the second public, solemn blest, and consummated. This is authoritatively laid down in a decretal of Pope Gregory IX. (A.D. 1230), which was cited *verbatim* by Lord Brougham in Mills's case. Well might Lord Denman ask, how any ordinance of the 10th or 11th century, supposing it had declared a marriage void for want of a priest's benediction, could continue to be received as law by an English Ecclesiastical Court, in the face of this decretal.

Unsolemn marriages, then, were *de jure* valid, but irregular. They were more or less irregular (and consequently more or less discountenanced by all courts), in proportion as they omitted more or fewer solemnities. The cases doubtless were rare, in which all solemnity was omitted; because few persons would, in those days, wantonly brave, to that extent, the censures of the church, the disfavour of the law, and the odium, attached to such conduct by public opinion. Of these few cases, too, the records, which have come down to us, are of course much fewer. Still it does so happen that we have notice of two cases, on the very point of this decretal cited by Lord Brougham. One, of the 13th century, is to be found in Coke upon Littleton. (a) "A. contracts *per verba de presenti* with B., and has issue by her, and afterwards marries C. *in facie ecclesiæ*. B., recovers A. for her husband, by sentence of the ordinary." The other, of the 14th century, was quoted from the rolls of the province of York. "John de Steinbergh made a contract *cum copula* with Cecilia de Portynton, and afterwards married Alicia de Crystyndome *in facie ecclesiæ*: and on suit brought by Celicia, the Ecclesiastical Court pronounced the marriage with Alicia *fuisse et esse invalidum*, and adjudged John *in virum legitimum Cecilie*." Here observes the Lord Chancellor, in *The Queen v. Mills*, "the marriage

(a) 33 a. n. 10.

with Alicia is pronounced not only to be, but to *have been* void, agreeable to the rule of the Ecclesiastical Court, that when a marriage, voidable by reason of precontract, is annulled, it is annulled *ab initio*."

The Ecclesiastical Courts not only had jurisdiction on the validity of marriage *de jure*, but that jurisdiction was *exclusive*. This again is strongly, ably, and clearly put by the Lord Chancellor,—“It must always be remembered (says his lordship) that the Spiritual Courts were the *sole* judges of the lawfulness of marriage, where that question was *directly* in issue.” “The discussion whether there be marriage or not (say both Bracton and Eleta) belongs not to the secular, but to the ecclesiastical judge.”(a) When, therefore, a question, directly putting in issue the *right* of marriage, arose in the King’s Courts, they referred it to the bishop, to certify whether the marriage was lawful or not. In all such cases, the rule of the King’s Courts was, “that judgment must be given according to the ordinary’s certificate;” and when so given it was conclusive against all the world. For instance, in the case of alleged bastardy, where the bishop had certified the marriage of the parents to be lawful, “the effect of this proof of legitimacy (says Bracton) is, that when once it is proved, and a judgment given accordingly in the King’s Court, the individual shall be held legitimate always against all persons.”(b) And so it was ruled A. D. 1309.(c) So much for marriage *de jure* as deterimined by the Spiritual Courts, and recognized and carried into full effect by the King’s Courts.

How, and to what extent, marriage *de facto* came to fall under the jurisdiction of the common law, is now to be explained. The lay judges, though they trembled to invade the spiritual sanctuary, were active and astute enough, in maintaining and extending their own jurisdiction over temporal concerns, in the name, and by the authority and power of the temporal sovereign. In the first place, therefore, they prohibited the Ecclesiastical Courts from holding plea *de laico feodo*.(d) Secondly, they would not allow the bishop to certify marriage without a reference to him for that purpose

(a) Br. 5, 19, 1; 1. 6, 39.

(c) Y. B. 3 E. 2 M. T. 53.

(b) Br. 5, 19 7.

(d) Glanvil, 12, 21.

from the Kings's Courts.(a) And, thirdly, they would not make such reference, when the right of marriage was not directly in issue, or when the certificate might affect a person deceased, or otherwise incompetent to make defence. It must be remembered, that though marriage itself was deemed spiritual, the incidents to marriage, such as legitimacy, dower, tenancy by the courtesy, &c., were creatures of civil institution, and on this domain the churchman strove in vain to encroach.(b)

There were two classes of cases, in which the *right* of marriage not being directly in issue, the King's Courts allowed a presumptive proof of marriage, founded on acts *in pais*, to entitle the parties to certain temporal privileges. Where the presumption arose from cohabitation and reputation, it was called marriage *in possession*; where it arose from an act of public betrothment, it was called marriage *in fact*. It would seem that the common law had laid down no positive rule, as to the kind or degree of publicity or solemnity necessary to the proof of marriage in fact; or else that the rule had varied at different times. A certain degree of publicity, and a certain degree of solemnity would naturally be required. Some persons perhaps may have thought, that the ceremony should be performed in a church or chapel, or at a church door; others, that a mass should be sung, or a benediction uttered, or a ring used; whilst others again may have been willing to dispense with all these, provided only that the party were not on his death-bed. One thing, however, is certain, that the rule recently suggested, which renders the presence of an *episcopally* ordained minister essential to the validity of a marriage, is to be found nowhere in the law—absolutely *nowhere*!—in no reported judgment, in no text-book or commentary, in no *dictum* of any judge, scarcely in any argument of counsel! If deemed necessary; it was plainly not sufficient, in the cases of *Foxcroft*(c) and *Del Heith*,(d)

(a) 2 Rol. 589, 1, 50.

(b) About 60 years before the Statute of Merton, Pope Alexander III. claimed to decide on the *legitimacy* of an English lady, but was compelled to give up this point, as temporal, retaining, nevertheless, his spiritual jurisdiction on marriage. See *Observations on Lord Cottenham's Opinion*, pp. 19, 20.

(c) Roll. Ab. 359.

(d) 34 Ed. 1.

for the former was married by a bishop and the latter by a priest, and yet the sons, in both cases, were held illegitimate; though, for aught that appears, both marriages might have been certified to be good by the ordinary, if reference had been made to him for that purpose. These were cases of bastardy. Now it is plainly laid down both by Bracton and Fleta, that if the party asserting his adversary's bastardy put it on the ground, that the father of the latter *never* married the mother, or that their marriage was *unlawful*, this was a question of marriage *de jure*, and was sent to the bishop; but if he put it on the ground, that he was born *before* his father's marriage, or begotten by *another man*, the right of marriage was not in issue, and the trial must be by a jury.^(a) Hence the distinction afterwards found in the books, between general and special bastardy, to the latter of which classes these cases evidently belong.

The circumstance, which has rendered the cases of *Foxcroft* and *Del Heith* (with some similar ones) such stumbling-blocks, in the investigation of the Matrimonial Law, is simply this—the decisions have been supposed to be given on marriage *de jure*, when they were really given on marriage *de facto*. In *Del Heith's* case it was clearly so; for the suit was on a writ of ejectment; and it is said, "it was asked, *at the trial*, whether any espousals were celebrated between his parents in the face of the church, and because *it was not proved* that John Del Heith was ever married to Katherine in the face of the Church, the *jury* found that the plaintiff had no right to the lands." The question whether the private marriage, which was admitted to have taken place, was *valid* or *void*, was one to which the jury were totally incompetent, and on which they did not pretend to offer an opinion.

The King's Courts allowed different issues to be sent to trial, according to the nature of the suit. When the suit touched the right of marriage directly, they allowed the issue "ne unques accouple en loial matrimonie," to go to the bishop: when it concerned only a marriage in *fact*, or in possession, an issue "Feme ou nient sa feme" (or the like) was sent to a jury.^(b) The rules of evidence and procedure in the two

(a) Br. 5, 19, 1; Fle. 6, 39. (b) Y. B. 18 Ed. 3, A.D. 1344; and 39 Ed. 3, A.D. 1365.

courts being so totally different, it is obvious that the decision of a jury, on the one issue, could in no degree affect that of a bishop on the other; far less could a verdict on a marriage *de facto* serve as a “test” of the validity of a marriage *de jure*; not to mention that the tests themselves might produce the most opposite results. “A marriage might be lawful as to the succession, and unlawful as to the action of dower.”(a) On the other hand, a marriage *de jure*, valid, but irregular, might, in consequence of that irregularity, be disallowed in the King’s Courts as insufficient *de facto* to entitle the parties to the particular civil right in question; for (says Lord Stowell) “the common law had scruples in applying the *civil* rights of dower, and community of goods, and legitimacy, in the cases of these looser species of marriage.”(b) But this could not affect a decision of the Ecclesiastical Court on the validity of such a marriage. “Rights of property (as he elsewhere says) have nothing to do with marriage considered as to the *vinculum*.”(c)

Marriages *de facto* then might, according to circumstances, have been valid or void *de jure*. But we find a further distinction made by common law writers between marriages *void* or *voidable*, which, according to Blackstone, turns on the nature of the disability to contract marriage; and he divides those disabilities into *canonical* and *civil*: the first comprising pre-contract, consanguinity, affinity, and personal infirmity; the second including a prior marriage, want of age, want of reason, and want of consent of parents. These distinctions are not very philosophical; since the last was neither canonical nor civil till 1753, and the preceding three, which he calls civil, are equally canonical. We shall therefore attempt another explanation of the matter. The term *voidable* is equivocal: in common parlance it would seem to signify something essentially valid, but capable of being *made void for the future*: here, on the contrary, it is applied to something apparently valid, but capable of being *declared void from the beginning*. Take, for instance, a case of consanguinity. Rolle says, “If a man marry his mother, they are husband and wife till the

(a) Fleta. 5, 28.

(b) 2 Hag, 67.

(c) 1 Hpg. 236.

marriage is dissolved : ” and for this, he quotes a judgment in the year book of 1430. Now, what court ruled this ? A lay court, incompetent to decide on the validity of any marriage *de jure*, and which intended merely to decide, that the parties in this particular case were entitled to certain rights on the *presumption, ex facto*, that they had contracted a valid marriage. Moreover, the presumption itself was pronouncad defeasible, which at that time was inconsistent with marriage *de jure*, because *that* was deemed absolutely indissoluble. Now, suppose these same parties had gone before a competent court ; what would have been the language there held ? The court would have said, “ You, are not husband and wife, and *never were* so ; your pretended marriage is no marriage at all : it was a nullity *ab initio*.” So, in one of the cases of pre-contract before mentioned, the court said, in substance, “ You, John de Steinbergh, never were really married to Alicia : a mere ‘ show or effigy of marriage ’ passed between you ; but it could not be a marriage *de jure* ; for you were, at that time, the husband of Cecilia ; and a Christian man cannot be at the same time the husband of two wives.” Moreover, the common law itself treated such a marriage, when dissolved, as having been void *ab initio* ; for it deprived the second wife of dower, and bastardised her issue ; (a) which it could never have done if the right of the one had been vested, and the *status* of the other fixed, by solemnization.

The real and only distinction, at the time of which we are speaking, between the classes since called *void* and *voidable*, was a distinction in the practice of the common-law courts. Both classes were essentially void by the canon law, to which they were both subject ; but the circumstances of some marriages afforded a presumption in their favour, which was held sufficient at common law, until rebutted by the sentence of a competent court. These marriages were called voidable, and until avoided were necessarily treated as valid. But others could offer, on the face of them, no such presumption. Marriage, being a contract, could not be even presumably good, if made between parties incompetent, by defect of age or mental sanity, to contract at all.

(a) 2 Co. Inst. 93.

Whether or not they were so defective, was not a spiritual question, but a physical fact *in pais*, of which the country could judge quite as well or better than the pope: and when the verdict of the jury had determined it in the negative, there was an end of the matter, in a court which professed only to deal with marriage *de facto*. The judgment on such a verdict, though (as we have said) in strictness merely interlocutory, with reference to the right of marriage, came to have the force and effect of a definite sentence; because the verdict itself could not well be gainsaid in any court. The same reasoning would apply to a marriage under duress, though on that point some seem to have doubted.^(a) The question of disability by a prior (solemnised) marriage was still more disputed. In a suit for dower in 1365, one of the judges appears to have thought that prior marriage was a question only fit for the Court Christian;^(b) and in a case of bastardy, in 1440, the same point being mooted, the reports ends "*quære legem.*"^(c) But finally it was left to be tried by a jury,^(d) probably because the presumptions from each solemnity being equal, the former, in point of time, must necessarily prevail, in a contract for life. It is obvious, however, that the second marriage is not absolutely void: for if the former be declared null by a competent court, the latter, if properly contracted, must be valid.^(e)

(*To be continued.*)

(a) 1 Rol. 340, l. 20

(c) Y. B. 19, H. 6. 32.

(e) Cooke v. Browning, Arches, A. D. 1812.

(b) Y. B. 39. E. 3, 15

(d) 1 Rol. 340. l. 13.

THE UPPER CANADA JURIST.

HINTS ON THE EXAMINATION OF WITNESSES.

(Continued from page 106 of last Number.)

The rest of Mr. Field's pamphlet is occupied with matters of a technical kind, regarding the rights of witnesses to their expenses, the modes of compelling their attendance, &c., &c., which are beside our present purpose, though not unworthy of consideration, when this branch of law comes to be brought under the consideration of the legislature, or of a board authorised to give it the complete revision it is pretty generally admitted to require. At the same time, we should find it no easy task to suggest a remedy for the principal defects—the insufficient remuneration for loss of time, and the difficulty of inflicting an adequate penalty for wilful or even fraudulent non-attendance.

In strictness, none but attorneys and medical men can claim a compensation for their time, though a practice has grown up of making other witnesses an allowance on this score. For example, at the last Guildhall sittings, a witness claimed something for loss of time, and Lord Denman so far entertained the claim as to enter into the question of its reasonableness. But such allowances must be jealously watched, or they will rapidly degenerate into bribes. Everybody knows that surveyors, and (we regret to add) scientific witnesses, may be had in any quantity, and on either side of any given question of value or opinion, by whoever chooses to bid up to their price.

On the first blush of the question it would seem that the party ought to enjoy the privilege of summoning what witnesses he stands in need of, and that he himself must be the sole judge of the necessity. If he were obliged in each individual instance to prove the materiality of the expected evidence, it is obvious that he might be put to great inconvenience or suffer serious damage; for a prudent litigant will

come prepared to meet every combination of circumstances that might reasonably be expected to present itself. On the other hand, it is hardly politic to place the time and comfort of any (the most occupied or most distinguished) members of the community at the mercy of any wrongheaded, quarrelsome, or turbulent person who happens to be afflicted with a diseased love of notoriety. We remember one case, a prosecution for blasphemy, in which the defendant, by way of shewing the divided state of opinion on theological subjects, actually subpoenaed the heads of all the religious persuasions he could hear of, and when the day of trial arrived, these found themselves all shuffled up together in the waiting room—the Archbishop of Canterbury and the High Priest of the Jews being of the party. Lord Brougham knew better, and when Mr. Dica subpoenaed him, stayed away. There was an application for an attachment, but, as it could not be made to appear that he was able to speak to any material point, the court declined to interfere.

Mr. Best was induced to translate Quintilian's chapter concerning witnesses, with the view of supplying a chasm left by law-writers; who, he says, have paid little or no attention to the art of examining witnesses, from an opinion that it can be acquired by practice and experience only. This opinion is better founded than most of those advanced by what are called practical men—a title absurdly enough appropriated by common consent to those who are incapable of generalizing; but still something may be done to facilitate the acquirement by laying down rules or suggesting topics; and it is a fact, well worthy of grave reflection, that almost all that can be done in this way has been done by a Roman writer who flourished in the first century of the Christian era. Aristotle's *Rhetoric* includes nearly every useful precept in oratory; and nearly every useful precept regarding witnesses, which can be laid down beforehand, will be found in this one chapter of Quintilian.

His advice as to the best mode of impeaching their credit is commonplace enough, but throws considerable light on manners.

“But a severer battle is to be fought when the witnesses

appear in person. Speeches addressed to the judges, and questions put to themselves, are alike made use of both to impeach their testimony and to support it. First, in speeches, it is usual to declaim both in commendation of proof by means of witnesses, and in derogation of it. The following are the common places on this subject. It is contended, on the one hand, that no proof can be more satisfactory than the assertions of individuals who depose to facts within their own knowledge; while, on the other, all these temptations and motives, which so often induce men to give false testimony, are enumerated, in order to cause the witnesses, who have been produced, to be disbelieved. We next proceed to impeach the testimony of the witnesses more particularly,—still, however, in such a way, as to include many under one head of objection; for it is well known that orators have at times treated with contempt the evidence of whole nations, and at others condemned entire classes of testimony—such, for example, as hearsays—on the ground that the individuals deposing are not themselves witnesses of the transactions in dispute, but merely repeat the words of others who have not been sworn; again, in prosecutions for extortion, individuals, who swear that they paid the accused the money in question, should be looked on as parties to the cause, and not as witnesses. Sometimes each witness is attacked separately; in most orations where this course is adopted, it is made part of the main defence, but is sometimes the subject of a distinct speech, as it was in the case of the witness Vatinius.”

He proceeds to press an injunction of his master, Domitius Afer, whose books are unfortunately lost.

“He most wisely taught his pupils, that every orator should, in this part of his profession, (a maxim which doubtless applies generally), make it his first care to become familiarly acquainted with all the facts of the case. How this knowledge is to be acquired shall in its proper place be explained. It will supply him with materials for questioning, and, as it were, furnish his hands with weapons. It will also enable him, in his opening speech, to prepare the minds of the judges for the testimony to be produced. For every advocate should in his address comment on the evidence about to be given by his own and his adversary’s witnesses, since any statement of facts has weight or not with the person to whom it is given, according as he is predisposed to believe or disbelieve it.”

It is astonishing how very few of our best advocates do master their facts, although there is a splendid living ex-

ample of the extraordinary power that may be acquired by doing so. He, however, ordinarily reserves the knowledge, thus painfully acquired, for his reply, when he brings circumstance after circumstance to bear in a style which cannot fail to inspire the highest admiration in all capable of appreciating this kind of intellectual excellence. But, in his openings, he certainly errs constantly and we believe wilfully, against the precept of Quintilian,—to prepare the minds of the jury for the coming testimony by commenting on it. Our own impression is, that every material point in the case should be so far touched upon in the opening as to give the desired bias and prepare the jury for the meditated gloss or colouring, but slightly and, if possible, even parenthetically, so as not to suggest topics of defence.

In the Roman tribunal, witnesses were of two classes : such as appeared voluntarily, and such as were summoned by the judges.

“In the case of a voluntary witness, the advocate who introduces him can always know beforehand the testimony he comes to give, and seems, for that reason, to have the easiest task to perform when called on to examine. But even here tact and caution are requisite ; and measures must be taken to counteract the effects of timidity, unsteadiness, or indiscretion on the part of the witness, should he display such. For the opposing advocate often succeeds in confounding the witness, and leading him, as it were, into a trap, where, if caught, he does more harm to your cause than his evidence, given steadily and unshaken, would have served it. Your witnesses should, therefore, be well exercised out of court in the evidence which they are to give, and you should try them with the various questions which are likely to be put to them by the other side ; by which means they will either be rendered capable of standing firm when examined in court, or, should they be at all shaken in their testimony, the advocate by whom they were produced can, by a judicious re-examination, regain for them their former credit.”

The attorney who understands his business will take good care to put his own witnesses through a trying cross-examination, and would do well to insert in his brief not merely their answers to his questions, but the remarks suggested by their mode of answering. Still it by no means follows that they will tell the same story upon oath ; and, as a general rule, we

should say that the evidence of the lower order of witnesses turns out weaker, and that of the higher order stronger than was anticipated. The reason is obvious ; the lower order, regarding attendance as a holiday, wish to be subpoenaed, and the higher order do not.

The next passage is curious :

“ But even though the story our witnesses tell us be consistent in itself, we must still be on our guard against treachery on their part : for we frequently discover that they have been suborned by the opposite party, and, after having promised that their testimony shall be altogether in our favor tell things on the trial which make the other way, and which they seem to the judges rather to confess than depose to. We should therefore inquire into their reasons for wishing to injure the opposite party ; nor should it content us to learn that enmity has existed between him and them ; we should ask if that still continues ; besides, they might wish to make their conduct on this very trial a means of reconciliation with him ; we should also consider if it is likely that they have been bribed, or if, after all, they may not repent of their intention of giving evidence in our favor. But if it is necessary to be on our guard even when our witnesses are only going to depose to facts which really occurred, and which they know, much more is it so when people promise to give false testimony in our favor ; for not only are such more likely to repent of their original intention, but there is less reliance to be placed on their promise, and should they even persevere in their purpose, are more easily overthrown.”

This has been frequently adduced to show Quintilian's want of principle and the low state of morality existing amongst the advocates of Rome, who, it is inferred, thought themselves fully at liberty to use the testimony of witnesses who were confessedly hired to swear falsely. Mr. Best can find no better apology for him than one strongly resembling that suggested by a French writer on cookery for M. Corcellet, who was wont to use artificial means to give his geese a liver complaint :

De son estomac il faut distinguer son cœur.

Just so Mr. Best says that we must distinguish between the intellect and the moral sense of Quintilian, and urges that we may benefit by the critic's advice without copying his malpractices.

Great caution is recommended when the witness shows an undue degree of eagerness. The best course then is to avoid putting questions which would bring him directly to the point and if possible lead him to mix up the required statement with indifferent matters. When once made, no opportunity should be afforded him for repeating it. Quintilian's notions of cross-examination differ very little from those of a modern practitioner :

“ But when the witness you have to deal with is one of those who will not disclose the truth until he cannot help it, the advocate's greatest art is required in order to wring it from him. There is only one way of accomplishing this which is, by questioning him about matters which lie at a distance. For he will give you such answers as he thinks cannot make against the cause he wishes to favor; then, from the various matters he has thus been got to admit, you may place him in such a situation as to be unable to deny those facts which he is unwilling otherwise to make known. For as in our opening address we frequently bring together scattered arguments,—each of which seems in itself to make nothing against the accused, but by putting them all together, we prove the fact charged,—so, in like manner, we should ask a witness of this description a great many questions about the circumstances which preceded and followed the main transaction, as also about the time and place of the occurrence, the character of parties, and such like, in order to try to make him light on some answer which will either compel him to confess what we want him to tell us, or contradict what he has said already. Should this not occur, it will then be manifest that he is unwilling to speak about the matter in dispute; and we must then proceed to examine him about others which are extraneous to it, in order to try if we can catch him even in that way. Besides, we should prolong his examination on the material facts of the case, for this reason, that as a witness of this kind will seize every opportunity of coloring his evidence in favor of the accused, even more than is requisite for his exculpation, the judges observing this, will be induced to suspect him, which will have the effect of rendering his examination quite as injurious to the accused as if he had disclosed the whole truth against him.”

The present chief justice of the Queen's Bench is reported to have once spoken of “the vulgar practice of cross-examining every witness;” and it must be owned that no practice is more absurd. The majority even of our leading advocates,

when they had no materials for cross-examination, no new facts to elicit, and no ground for disbelieving the statement, will notwithstanding persevere in compelling the witness to repeat himself, in the vain hope of pushing him into an inconsistency; though their own observation must have taught most of them, that trifling discrepancies are uniformly disregarded by jurymen, and that the experiment almost always ends in bringing out the adverse facts more strongly against their clients. The mystic power attached by the public to cross-examination exists only in very rare and exceptional cases.

There is wisdom in the following maxim:

“To pass on to the second case we put; suppose the advocate does not know how the witness is biased towards the accused; he should endeavour to find this out by a cautious and step-by-step examination, as it is called, and lead him on gradually to the answer he is desirous of eliciting. But in as much as artful witnesses are to be met with, who answer at first to your entire satisfaction, in order to be able afterwards to tell what makes against you with the greater appearance of truth, the wary advocate should always dismiss a suspected witness while his testimony is favourable.”

The art of stopping at the proper moment is one of the highest moment,—in the speech, the evidence, or the general conduct of the case; for every fresh witness, new question, or additional statement, is a source of peril, and ought not to be lightly hazarded. No first-rate advocate, who has courage and independence enough to act upon his own judgment, will overlay his case; but too many, we fear, act upon the principle frankly avowed by the late Mr. M., who stated that he always made a point to call all the witnesses in his brief. “Did you never lose your cause by so doing?” “Often; but never my client.” There is no doubt that clients (both attorneys and parties) are dissatisfied unless their whole array of witnesses are regularly polled out; but, on the other hand, it should be remembered that (taking the narrowest and most interestted view of the question) general reputation attracts business, and that general reputation is influenced both by a man’s ordinary system of tactics and his success.

We next proceed (continues Quintilian) to consider the course which the defendant’s advocate should pursue in his

examination. And here the great thing is to know the kind of witness you have to deal with. For if you observe him to be of a timid disposition, work upon his fears; if you see that he is a weak man, try to entrap him; should he be of a passionate temper, get him into a rage; is he vain-glorious? then puff him up; or, if he appear verbose, entice him on to make him say something inconsistent with his direct testimony; but when you see that the witness is a prudent and steady man, either dismiss him instantly with the insinuation that he is surly and hostile to your cause, or in preference to trying to shake him by examination, throw out some short observation the court against his testimony; or if the opportunity present itself, turn him into ridicule by some pleasantry; or if any thing can be said against his character, attack his credit with the tribunal by commenting strongly on his misconduct. We sometimes meet with witnesses who to much uprightness of character join great diffidence, and we should not handle them roughly, for such persons may be frequently softened by gentle treatment, when any petulant attack would only exasperate them against us.

“Now the advocate’s line of examination may either relate to the matters in dispute, or be directed to extraneous subjects. When of the former class, let him follow the course we have already laid down for the prosecutor, and being by asking questions about matters which lie at a distance, and can excite no suspicion in the witness as to his object in asking them, and then frame his subsequent questions by the answers given; by which means he will frequently succeed in bringing unwilling witnesses into such a situation as to be able to wring from them what may be of service to his cause. Our schools, it is true, neither give their scholars any instructions, nor require any exercises from them, in this art; and the talent in question is rather the result of natural acuteness, or is acquired by practice. But if it be required to give an example of its exercise, I must refer you to the Dialogues of the Socratic Philosophers, and especially those of Plato, where, you see such an ingenious course of examination adopted, that although the answers given are for the most part happy enough, still the matter is brought to the conclusion which the interrogating party wished. It sometimes fortunately happens that the account which the witness gives is inconsistent with itself; at other times (and this latter is of more frequent occurrence), different witnesses give irreconcilable statements; but these, which are in general the result of chance, can also be brought about by an ingenious course of examination.”

“But above all things the advocate should be circumspect

in the way he puts his questions, for witnesses often retort with much repartee, and the feeling of the auditory is in general greatly in their favour. He should also, as much as he possibly can, employ words in common use, in order that the individual under examination (who is generally an illiterate person) may understand the question, or at least be deprived of the power of saying that he does not, a thing which makes the advocate appear not a little ridiculous.”—

We have already said that witnesses who come prepared to show off their wit, generally cut a bad figure; but if they attempt nothing of the sort, and the repartee obviously flows naturally and is suggested by the occasion, it is fatal to the examining counsel; as when Bearcroft, addressing a Mr. Vanzellan—“With your leave, Sir, I will call you for the sake of shortness, Mr. Van.” “And with your leave, Sir, I will call you for the same reason, Mr. Bear.” Still better, if the retort be unintentional or the result of simplicity, as when Lord Brougham, examining a gentleman as to facts within the knowledge of his wife, asked “Pray, Sir, is Mrs. Thompson here?” “No.” “No! I hope Mrs. Thompson is well?” “Quite well, I thank you, I hope Mrs. Brougham is the same.” The bystanders assert that the witness spoke with the most perfect *bonhomme*; but if he had studied all his life under Horne Tooke (the only professed puzzler of judges and counsel who succeeded), he could not have given a more effectual damper to the flippancy of his assailant.

We have reprinted these passages, and connected them with a few random observations of our own, merely in the hope of inducing reflection on the topics; for much more may be suggested than said regarding them. With the general rules or (as the ancient rhetoricians called them) the common places in his mind, the young practitioner will proceed with much greater confidence and effect, than if he had nothing better than his own limited experience for a guide; but nothing short of long observation, and some actual practice in courts of justice, will enable him to acquire the conventional tact and readiness necessary to bring even the most brilliant natural talents into play. Even the strict technical rules can only be learnt in this manner. Thus a leading question, according to the books, is one which suggests the answer; but such a ques-

tion is invariably permitted unless it suggests an answer regarding the precise matter in dispute. "I wish that objections to questions as leading might be a little better considered before they are made. In general no objections are more frivolous." So said Lord Ellenborough, and much time is certainly wasted by not putting leading questions, but the evil cannot be corrected unless a higher degree of mutual confidence can be established amongst the members of the bar. We regret to say, that it would not invariably be safe to suffer a departure from the strict rules of evidence, under the confidence that no unfair advantage would be taken. In fact the eagerness of competition, and the absence of any one acknowledged superior, have introduced an extent of conventional trickery extremely detrimental to the time of the public and the character of the profession. "Win your cause, honestly if you can, but at all events win it," is the word.

A correct knowledge of this rule of evidence, by the way, might be of considerable use to the attorneys (many of them clever accomplished men) who attend the revising barristers' courts. They constantly begin by asking whether the voter has *occupied*. When the action does not turn on occupation, the question is allowed; but then they almost always insist on beginning in the same manner when the sole point for decision is, whether the individual has occupied or not. It is quite useless to explain that the question is not simply a leading one, but requires the witness to swear to a legal conclusion. They reply that they have always been in the habit of putting it; and if you persevere in stopping them, they assume a look of injured innocence during the remainder of the day, and probably show you up in the county newspaper for an unconstitutional attempt to limit the franchise.

We have one more caution to add. Both bench and bar ought really to bear in mind that they have no well founded authority over witnesses, and that they might be made to look exceedingly foolish by a man of clear perceptions and strong nerves, reserved on following his own mode of statement, "Dont tell us *this*, Sir," and "We don't want to hear *that* Sir," may be all very fine so long as the present vague unde-

finer apprehension can be kept up, but suppose the witness were to turn round and say: "I have sworn to speak the whole truth, and I am ready to do so; but I will not state it in a garbled fashion to please any body; nor give what you call a direct answer, when I know that a false impression might be conveyed by it; nor say that a thing is either black or white, when in my opinion it is grey." Is there a judge upon the bench who would dare to commit? We rather think not. The prescriptive threat would be found about as formidable as the Speaker's, to *name* the member who should prove contumacious. "And what would happen if you should name me, Mr. Speaker," said an orator who had been somewhat unceremoniously put down during Sir Fletcher Norton's dynasty. "The Lord in heaven only knows," was the muttered yet distinctly audible reply.

—*Law Magazine.* H.

MARRIAGE DE JURE AND DE FACTO.

[Continued from page 128 of last Number.]

III. The third period of our historical survey begins with the Reformation. What change did that great event make in our matrimonial law? Did the legislature take from the Ecclesiastical Courts the jurisdiction of marriage *de jure*? On the contrary, it declared that all causes of matrimony appertained to the spiritual jurisdiction. (a) Did it abrogate the canon law previously received in those courts, respecting marriage? On the contrary, it declared that such canons as were not contrary to the laws of the land, should *continue* in force. (b) An attempt indeed was made to abrogate, in part, the decretal of Gregory IX. above mentioned, as "an unjust law of the Bishop of Rome." (c) "This statute," says the Lord Chancellor, "was pointed against the injustice of dissolving by reason of precontract a marriage solemnized *in facie ecclesiæ*, and after consummation between the parties; but it left the law, where there had been no consummation, as it stood before;" and very early in the

(a) Stat. 24 Hen. VIII. c. 12. (b) Stat. 25 Hen. VIII. c. 19. (c) 32 Hen. VIII. c. 38.

reign of Edward VI., the statute was repealed, and the law restored to its former state.

Accordingly, the Ecclesiastical Courts continued to hold contracts *per verba de præsenti* valid marriages, and public solemnizations with a third person, after such a contract, mere nullities; and the common law courts continued to recognize such judgments as lawful, and sufficient to convey titles to lands and goods. All this is clear from Bunting's case,^(a) which was merely the converse of the case in the thirteenth century, above cited from Coke upon Littleton. Here, A., the man, contracted with B., the woman. She afterwards publicly married C., and co-habited with him; but on suit in the Ecclesiastical Court she was restored to A., and the marriage with C. was declared void *ab initio*; and on the ground of this sentence the common law court held a son, whom she subsequently had by A., legitimate. In the very next year (1587), occurred the case of Edward Hampden's daughter, whose marriage was dissolved *causâ præcontractûs*,^(b) Shortly after these cases, Swinburne wrote his Treatise on Spousals—"a work (says the Lord Chancellor) of great learning." He lays it down, in the most precise terms, that a consent *de præsenti* is in truth very matrimony; that the parties to it are husband and wife, in respect of the substance and indissoluble bond of marriage; and that though one of them should afterwards marry a third person, in the face of the Church, and consummation should follow, yet the first contract is good, and shall prevail against the second marriage;" and he cites to this effect various passages of the decretals, as being part of the canon law binding in England. This same canon law, as to marriage *de jure*, continued unaltered, except by the Commonwealth ordinance of 1653 and the statute relative thereto, for the remainder of this period. Attempts were made in vain to correct it by the *Reformatio Legum Ecclesiasticarum* in 1550, and by bills to restrain clandestine marriages, in 1666, 1667, 1677, and 1685; but none of these measures ultimately affected the general jurisprudence of the country.

IV. We come then to the Revolution of 1688.—The law

(a) 4 Co. 29, a.

(b) 2 Co. Inst. 93.

of marriage *de jure* remained the same, from this epoch till 1753. Attempts indeed were made to restrain clandestine marriages by bills brought into parliament, in 1689, 1690, 1691, 1696, 1697, 1718, and 1735: but they all failed. The books of strict authority in ecclesiastical law, published during this period, were those of Ayliffe and Oughton, who both follow the doctrines of Swinburne. As to the practice of the ecclesiastical courts, it is frequently alluded to, as matter of notoriety, in the common law discussions of the time. Lord Holt, in *Jesson's case* (A. D. 1703,) and in *Wigmore's case* (A. D. 1705,) distinctly states it to be such as we have described; (a) and the same was so asserted, without dispute, in *Holt v. Ward* (A. D. 1732.) (b) It has been erroneously supposed to have been ruled differently in *Haydon v. Gould*, (A. D. 1710), (c) but there the *regularity* of the marriage only was in issue, not its *validity*; and it was held (though the Ecclesiastical Courts seem afterwards to have relaxed that strictness), that an irregular marriage (ex. gr. in a Sabbatarian congregation) would not entitle a party claiming under it to an administration, which was expressly demanded as a "right due by the ecclesiastical law," and properly so described; for though regulated by various statutes, it was derived from the ancient jurisdiction of the ordinary. The judgment no doubt was grounded on the rule, "*frustrà Ecclesiæ auxilium implorat qui ejus contempserit auctoritatem.*" (d) This rule, however, did not prevent a party who had contracted a valid but irregular marriage, and was therefore in contempt, from offering to purge the contempt by a regular solemnization. Accordingly we find a Quaker woman alleging a contract *de presenti*, and citing the man to solemnize. (e) So, on a marriage contract *per verba de presenti*, between Jews, and a suit to compel solemnization, the libel was admitted, but the proof failed; (f) so, where the parties had read the words of the English ritual, but not in the presence of a clergyman, it was established as a marriage, and solemnization decreed. (g)

(a) 2 Salk. 437.

(b) 2 Stra. 937.

(c) 1 Salk. 119.

(d) Sanchez, iii. 42, 2.

(e) *Haswell v. Dodgshon*, Deleg. 1730; Letter to Lord Brougham, 59.(f) *Da Costa v. Villareal*, 1733. 1 Hag. C. R. 242.(g) *Leeson v. Fitzmaurice*, Deleg. 1732; Letter to Lord Brougham, 59; Observations on Lord Cottenham's opinion, 56.

Sir E. Simpson, at the conclusion of this period, thus briefly sums up the law as then practised: "The canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnities according to English rites;" (a) and Lord Hardwicke shows its recognition by the common law,—“Where a marriage is in fact, or in a contract *in præsentia*, or in a suit for restitution of conjugal rights, a sentence in the Ecclesiastical Court will be conclusive, and bind all; but not if given in a collateral suit.” (b)

How far a marriage of Dissenters may have been allowed as a marriage *de facto*, previously to this time, is somewhat doubtful. But the revolution, which now occurred, caused one of those mighty changes in the frame of English society, which could not fail to leave deep traces on the national jurisprudence. Among its first and most distinguished fruits was the Toleration Act, stat. 1 W. & M. sess. 1 c. 18. Protestant Dissenters were for the first time, constitutionally recognized, as entitled to full protection in the peaceful exercise of their religion, and could not be prosecuted in an Ecclesiastical Court for not conforming to the Church of England. Two years after this, the bill of 1690 to restrain clandestine marriages was brought in, which, for the first time in Parliamentary legislation, proposed to make all such marriages *void*. It was thereupon moved, “that the act should not *extend* to the marriages of quakers,” clearly implying that, but for the proposed law, their marriages would be good either *de jure* or *de facto*. The bill indeed dropt; but soon afterwards occurred the case of *Hutchinson v. Brookbank* (A. D. 1694). (c) *Hutchinson* and his wife had been married in the face of a dissenting congregation, and were afterwards libelled in an Ecclesiastical Court, for fornication. They thereupon applied for a prohibition, suggesting that their marriage was protected by the Toleration Act, and leave was given them to declare in prohibition, which clearly showed, that the court inclined in favour of their suggestion. The King’s Court, therefore must at least have regarded it as a marriage *de facto*; and though the matter

(a) *Scrimshire v. Scrimshire*, 1752, 2 Hag. C. R., 400.

(b) *Roach v. Garvan*, 1748, 1 Vez. 157.

(c) 3 Lev. 376.

appears to have dropt, yet its impression was very effectual; for we never afterwards hears of any attempt by the Ecclesiastical Courts to disturb married dissenters, on such a pretext, either before or after stat. 27 Geo. III. c. 44., which only protects persons *lawfully* married.

An act of 1695, (a) adverts to "marriages or pretended marriages" of Quakers and Jews; and declares, that they shall be of the same force and effect, as if the act had not been made. Here again we have an evident implication, that some of them at least may have been good, either *de jure* or *de facto*.

In Wigmore's case (A.D. 1705), there was an Anabaptist marriage, on which the wife sued in the Spiritual Court for alimony, and the King's Court refused to prohibit. My Lord Holt gave a strong opinion, that th's was a valid marriage *de jure*, and he certainly did not imitate, that he would not have held it good *de facto*.

Fielding's case, which occurred in the same year, (b) was one of bigamy, for which offence (according to Coke) an unavoided marriage *de facto* supports the indictment. In the disputed marriage, there was no regular solemnization. A sort of ceremony indeed was performed by a *Romish priest*; but the judge did not rest the legality of the marriage on that fact alone. He merely mentioned it as *one of the circumstances*, from which the jury might infer a marriage *de facto*, as he probably would have done had a minister of any other communion intervened. Indeed, after the indulgence given by the Toleration Act to protestant dissenters, it would have been strange to refuse to their ministers a privilege conceded to Romish priests, few of whom could at that time be in the kingdom without incurring the guilt of treason. Yet strange to say, this very case of Fielding seems to be the sole authority (except the obscure fragments of Edmund and Lanfranc) for holding *episcopal* ordination to be the test of a lawful marriage! In 1710 occurred the above-mentioned case of a Sabbatarian marriage, in which, though the Ecclesiastical Court refused the husband administration, yet it

(a) Stat. 6 & 7 Wm III. c. 6 s. 63. (b) 14 St. Tr. 1327.

was said, "the wife, who is the weaker sex, and the children, who were in no fault, may entitle themselves to a temporal right by such a marriage." If so, it was clearly, by law, a marriage *de facto*. (a)

In 1718 another bill was brought into the House of Commons, to prevent candlestine marriages; and on this occasion a clause was agreed to *by the whole House*, "that the act should not extend to *prejudice* the marriages of Quakers, *solemnized* by Quakers, between Quakers." One branch of the Legislature, then, at least, recognized those marriages as including a public solemn bethrothment, and conveying some legal rights, which would seem, on principle, to be all that is essential to a marriage *de facto*. And indeed we find it laid down about this time in a work of repute, that a marriage *de facto*, or in reputation, *as among the Quakers*, hath been allowed by the temporal courts to be sufficient to give title to a personal estate." (b)

V. We now reach the fifth period of the Matrimonial Law. Lord Hardwicke's bill was enacted in 1753. We shall not here dwell on the inconsistencies and iniquities of that act. They have been fully set forth in one of the pamphlets before referred to. (c) Happily, it has ceased to disgrace our statute-book; and we shall only observe, that by rendering all marriages in England null, which were not solemnized according to its enactments, it gave to the common law courts a concurrent jurisdiction on marriage *de jure*. Our present concern, however, is not with the cases under the act, but with those exempt from its mischievous operation; viz., those of Scotch marriages, marriages between Quakers and between Jews, and marriages solemnized beyond the seas, including those on the sea, and in Ireland.

The Scotch marriages were treated on the same principles as those beyond the seas, which we shall presently consider.

Jewish Marriages, both before and after the act, were probably considered as governed by a foreign law (namely, that of the Hebrew people); of which law the courts received evidence, as of a matter of fact.

(a) Haydon v. Gould, ut sup.

(c) Letter to Lord Brougham, p. 67.

(b) Wood's Inst. b. 1. c. 6.

The marriages of Quakers requires more particular examination. "The case of the Quakers," says the present Lord Chief Justice of the Common Pleas, "is certainly one which it is *difficult*, altogether to dispose of." The Lord Chancellor says, "It is of *difficult* solution." And Lord Cottenham says, "I have felt the fact, that such marriages have been recognized in several cases very *difficult* to be explained." Now, this difficulty does not seem to strike Lord Brougham, Lord Denman or Campbell. They all think it clear that the act contemplates the marriages of Quakers as good. Let us look then at the provisions of the act. Sir Nicholas Tindal suggests, that the exception of the marriages of Quakers and Jews, "amounted to a tacit acknowledgment by the legislature, that a marriage solemnized with the religious ceremonies which they were respectively known to adopt, *ought* to be considered sufficient." But other sects were known to adopt religious ceremonies fully as much entitled, as those of Quakers and Jews, to the favour of the legislature; for instance, the Sabbatarians, who used the form in the Common Prayer-book, excepting the ring: it could not, therefore, be from any consideration of the ceremonies, that these two classes of marriages alone were deemed valid. Besides, the statute does not say they shall be valid: it only applies to them a well-known formula—"this act *shall not extend*" to such and such marriages. It would be a perfectly novel mode of construing that formula, to read it "this act *shall not extend* to certain marriages heretofore void and *shall render* them henceforward valid." The section immediately preceding says, "this act shall not extend to any marriages of the Royal Family." Did any body ever dream, that marriages of the Royal Family were void before the act, and were made valid by the act? The only intelligible exposition of the clause in question is, that it leaves the marriages of Quakers exactly as they were. If, therefore, we find this class of marriages uniformly recognized as valid after the act, we must conclude that they were held so (either *de facto* or *de jure*) before the act; but before the act they were not legally distinguishable from other marriages of protestant dissenters; therefore before the act all marriages of protestant

dissenters must have been held valid, either *de facto* or *de jure*. If, again, we are asked, why Quakers were more favoured by the act than other dissenters, we fear no better reason can be given than their unbending firmness. A Presbyterian, or an Anabaptist (it may have been thought) would submit to be married in a church,—a Jew, or a Quaker, never.

That Quaker marriages have been recognized in several cases since the act, is notorious; and, as Lord Cottenham candidly admits, “it is impossible not to feel the importance of the fact.” In the very year 1753, an Anabaptist marriage, which, being before the 25th of March, 1754, could not be affected by the act, was allowed as the ground of a suit for criminal conversation, in *Wooston v. Scott*, coram Denison, J., at Thetford, and a verdict obtained for £500. On this case Buller, J., observes, “It has been doubted whether the ceremony must not be performed according to the rites of the Church; but as this is an action against a wrong-doer, and not a claim of *right*, it seems sufficient to prove the marriage *according to any form of religion*; as in the case of Anabaptists, Quakers, or Jews.”(a) Now, this is only saying, in other words, “As against a wrong-doer, in an action of tort, a marriage *DE FACTO* without the presence of an episcopally ordained minister, was held, before Lord Hardwicke’s act, and should still be held, sufficient. Accordingly, a Quaker marriage was held sufficient, in a like action, as cited in 1776 by Willes J., in *Harford v. Morris*.(b) And again in 1829, in *Deane v. Thomas*.”(c) So, as to personal property, “Widowers and widows,” says Lord Campbell, “being Quakers, and the children of Quakers, have received *administration* in the Ecclesiastical Courts; and in cases of intestacy, have succeeded to personal property,” according to the Statute of *Distributions*.” So, “in tracing a title to real property,” adds his lordship, “no objection has ever been made, on the ground that it had been in a Quaker family; and no doubt has existed that the eldest son of a Quaker marriage would take, by descent, lands of which his father

(a) Buller, N. P. 28. (b) 1 Hag. C. R. Ap. 9. (c) 1 Moo. & Mal. N. P. 361.
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died seized in fee simple." So in a devise of lands in Ireland, (a) Lord Chancellor Manners held, in 1824, that Quaker marriages were meant to be included in the Irish Statute 21 & 22 Geo. III. c. 25, which was a declaratory act for the removal of any doubts which *might have arisen* concerning marriages between protestant dissenters, and applied to all such marriages theretofore entered into, or that should thereafter be entered into, and declared and enacted that they should be, and be held good and valid, to all intents and purposes whatever. Nor must we omit to notice an expression of the great Lord Mansfield, who, having laid it down in *Morris v. Miller* (A. D. 1767), that a marriage in fact was necessary to support a suit for criminal conversation, says afterwards, in *Birt v. Barlow* (A. D. 1779), "There are marriages among *particular sorts of dissenters*, where the proof by a register is impossible: evidently treating those marriages, as marriages in fact. (b)

It has been urged as an objection to Quaker marriages, that the Ecclesiastical Court will not grant restitution of conjugal rights on them. (c) But if this be now the practice (which may be doubted), it must rest on no objection to the validity of the marriage, but to the mode of its celebration, which the ecclesiastical law may designate clandestine, and may therefore apply to it the rule "*Petens restitutionem uxoris non auditur de jure, ubi matrimonium est contractum clandestinè.*" (d)

The last exception in Lord Hardwicke's Act is that of marriages solemnized *beyond the seas*. These, with which Irish and Scotch marriages may be classed, remain, both *de jure* and *de facto*, as they were before the act. The first general rule is, that if they are valid by the *lex loci contractus*, they are valid here. This rule, though now familiar to all our courts, does not seem to have been received till some time after the Marriage Act. It was strongly argued for by Sir E. Simpson in *Scrimshire's case*, above cited, and is supposed to have been adopted as to scotch marriages, by the delegates in *Compton v. Bearcroft* (1769); though this is

(a) *Haughton v. Haughton*, 1. Molloy, 611. (b) *Dough.*

(c) *Green v. Green*, 1 Hag. C. R. Ap. 9. (d) *Atho. ad Const. innotuit.*

doubtful. It seems to have been recognized in Chancery in a case in 1781,^(a) and was adopted, on full plea and proof of the law of Scotland, in *Beamish v. Beamish*.(1793) In that year, too, it was held, that if proved as a marriage *de facto*, it would carry dower.^(b) To many cases, however, the general rule will be found inapplicable ; as where no local law is ascertainable, or where if ascertained, it may be found to shock our notions of rectitude, or where extraneous circumstances render strict compliance with its dispositions impossible. In all such cases a marriage *de jure* or *de facto*, which would have been good, as such, is contracted in England before 1753, must be good at present, to the same extent, if contracted abroad.

Now we have seen, that in England, before the act, marriages *per verba de præsenti*, without the presence of an episcopally-ordained minister, were allowed as marriages *de jure* ; and marriages of Quakers, Anabaptists, and Jews (where, of course, no episcopally-ordained minister was present), were allowed as marriages *de facto* ; there can, therefore, be no ground for holding the presence of an episcopally-ordained minister indispensable to a marriage beyond the seas, *de jure* or *de facto*. Accordingly in *Harford v. Morris* (1776), Sir G. Hay held, that the parties being *in itinere*, their marriage at Ypres was not subject to the local jurisdiction, and that though celebrated by a Calvinistic chaplain, yet it was a good marriage *de jure* by the law of England. In *Rex v. Brampton*, where the marriage was in St. Domingo, Lord Ellenborough did not hold, that it was necessary, by the common law of England, that the person officiating should be episcopally ordained. On the contrary, he said, “ A contract of marriage *per verba de præsenti* would certainly have bound the parties before the act.”^(c) In *Lautour v. Teesdale* (1816), where the marriage was at Madras, Lord Chief Justice Gibbs did not hold the presence of an episcopal clergyman necessary ; on the contrary, he said, that “ before the Marriage Act, a contract *per verba de præsenti* was considered to be an actual marriage.”^(d)

(a) Lib. Reg. A. 1709, f. 552.

(b) *Ilderton v. Ilderton*, 2 H. Bl. 145.

(c) 40 East. 288.

(d) 8 Taunt. 387.

It seems generally admitted, that the marriage of law of Ireland, where not varied by statute, is the same now, as that of England was before the Marriage Act; and that in Ireland as well as in England, a marriage *de facto* will support an indictment for bigamy. Now, we find indictments for bigamy sustained on Irish marriages at common law, without an episcopal minister, in the following cases, prior to that of Millis, viz.: Murray's coram Sylvester, R. (1815); Marshal's coram M'Lellan, B. (1828); Wilson's coram Torrens, J. (1828); M'Laughlin's coram Moore, J. (1831); Robinson's, coram Foster, B. (1838); Halliday's, coram Pennefather, B. (1838); and Ancruey's coram Cramp-ton, J. (1841). The first of these was tried in London before the Recorder, who consulted with them on the then Attorney and Solicitor-General and some of the judges; and the case was taken up in parliament by Sir S. Romilly, as one of hardship on the facts; but nobody disputed the law. The other trials were in Ireland. Here is, then, a *series rerum judicatarum*, proceeding uniformly for twenty-six years on the principle, that the presence of an episcopally ordained minister is *not necessary* to a marriage *de facto* at the common law of this country.

Numberless have been the opinions both of civilians and common lawyers, of the first eminence, to the same effect. We need only mention two. In 1804, that learned and careful investigator of legal doctrines, the late Mr. Justice Holroyd, gave a most elaborate opinion in favour of a marriage had at Gibraltar, where the ceremony was performed by a person *not in orders*; and he held, that by the law of England, exclusive of the Marriage Act, such a marriage would be deemed valid.(a) In 1818, Sir C. Robinson, afterwards Judge of the Admiralty, Sir S. Shepherd afterwards Chief Baron of Exchequer in Scotland, Sir R. Gifford, afterwards a Peer and Master of the Rolls, Mr. Sergeant Lens, Mr. Cooke, Mr. Bosanquet, afterwards a Knight and Justice of the Common Pleas, Dr. Swabey, and Dr. Lushington, now Judge of the Admiralty, all joined in an opinion, that the marriages of British subjects in India by ministers

(a) Observations on Lord Cottenham's Opinion, Appendix.

of the Church of Scotland (of course not episcopally ordained), were then governed by the law of England, exclusive of the Marriage Act, *and would be considered in Courts of Common Law as marriages de facto.*(a) And we happen to know that Sir Samuel Romilly and Sir Arthur Pigott coincided in the same opinion.

We have but little space for the application of the principles deducible from our historical survey to the three cases placed at the head of the present article.

1. *Dalrymple v. Dalrymple* (A. D. 1811). Mr. Dalrymple made a contract *per verba de presenti* in Scotland, with Miss Gordon, no other persons being present. He afterwards came to England, and here married Miss Manners *in facie Ecclesiæ*. Miss Gordon brought a suit for restitution, in the Consistory of London, where the contract with her was pronounced to be a valid marriage, by the Law of Scotland and the marriage with Miss Manners to be null and void; and this judgment was unanimously affirmed by a full bench of delegates, including judges of the common law and civilians. In the course of Lord Stowell's judgment (one of the most splendid pieces of judicial eloquence ever delivered from any bench), that great lawyer, speaking of the time before Lord Hardwick's act, laid it down:—

“1. That the *Ecclesiastical* Courts of this country, which had the cognizance of matrimonial causes, enforced that rule of the canon law, which held an irregular marriage constituted *per verba de presenti*, not followed by any consummation shown, *valid* to the full extent of voiding a subsequent regular marriage contracted with another person.”(b)

“2. That the same doctrine was recognized by the *temporal* courts, as the existing rule of the matrimonial law of this country.”

These doctrines relate to marriage *de jure*: and it would be superfluous to observe how fully they are borne out by the authorities above cited. For the first, we need only refer to the decretal of 1230, and the extracts from Swinburne; for the second, to *Bunting v. Lepingwell*, and *Roach v. Garvan*.

(a) Letter to Lord Brougham, Appendix, No. 11.

(b) 2 Hag. C. R. 97.

2. *Regina v. Millis* (A. D., 1844). Of this very voluminous case, an extremely compressed account was given in our last number. It was there considered as involving a decision of the House of Lords unfavourable to the doctrines of Lord Stowell: and such, no doubt, will be the *prima facie* impression derived from these proceedings by the legal public in general. But with reference to the principles above stated, the case will present itself in a new and very important aspect.

George Millis, a member of the Established Church of Ireland, married in that County Esther Graham, a Presbyterian, in presence of a Presbyterian minister. He afterwards, in her life-time, married another woman by the rites of the Established Church. He was thereupon indicted in Ireland for bigamy, and on a special verdict, a majority of the Irish judges held notwithstanding the long series of judgments to the contrary, that the first marriage would not support such an indictment, and that he must, therefore, be acquitted. This judgment was brought by writ of error before the House of Lords, who took the opinion of the judges on two questions. Nine judges assembled, and "after considerable fluctuation and doubt," agreed in opinion "that by the law of England, as it existed at the time of passing the Marriage Act, a contract of marriage *per verba de presenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the celebration of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence, and with the intervention, of a minister in holy orders." They said also, that "admitting, for the sake of argument, that the law had held a contract *per verba de presenti* to be a marriage, yet looking to the statute on which the indictment (in Millis's case) was framed, the offence of bigamy could not be made out by evidence of such a marriage as this." And they further observed, that "the statute of 53 Geo. III. c. 81. had enacted, that no suit should be had in any Ecclesiastical Court in Ireland to compel the celebration of such a contract." These opinions were delivered by Lord

Chief Justice Tindal (7th July, 1843,) together with various reasons of his own in their support; for which he declared that his learned brethren were not to be held responsible. The lords debated on the case at distant intervals, and at length, on the 29th of March, 1844, the judgment of the House was given, affirming the judgment of the court below. This is all that appears on the *journals*: and so far the House of Lords may be thought to have given a *decision* on the law of the case. But if we examine the *minutes*, we shall find these additional circumstances. The *House* divided—"the votes were equal—whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, it was determined in the negative. Therefore the judgment of the court below was affirmed."

To understand how these proceedings bear on Lord Stowell's doctrines, we must look to the *speeches* of the law lords. Lord Abinger spoke very shortly; he said he had not had an opportunity of making any investigation in private on the subject; and though he agreed in the opinion of the judges, he made no allusion whatever to the case of Dalrymple. Lords Brougham, Campbell, and Denham, on the contrary, spoke of the judgment, in that case, in terms of the highest admiration, and fully subscribed to all its doctrines. The Lord Chancellor quoted it at great length; he showed its accordance with Swinburne, Ayliffe, Sir E. Simpson, Lord Holt, and Blackstone, in proving that a contract "*per verba de præsentī* was (prior to 1573) considered to be *marriage*—that it was in respect to its constituting the substance and forming the indissoluble knot of matrimony, regarded as *verum matrimonium*." In coming to this conclusion, his lordship wholly disregarded Sir N. Tindal's main authorities: he did not even mention the fragments of Edmund and Lanfranc, and he thought it plain, that Lord Holt spoke of the canon law *received in England*.

His lordship however observed, that such marriages were irregular—that they were destitute of many legal effects which belonged to marriages duly solemnised—and that this was fully admitted by Swinburne, Sir E. Simpson, and Lord Stowell himself. He then went into an able review of the

many particulars, in which such a want of civil efficacy was clear; and after urging reasons to show generally, that an unsolemnized marriage would not support an indictment for bigamy, he added, that the effect of the statute 58 George III., c. 81, had been to change entirely the character of a contract *de præsenti* in Ireland, as the act of 1753 had done in England; and, upon the whole, his lordship held that Millis was not guilty of bigamy. Our readers will observe, that the statute of 58 George III., c. 81, was passed seven years after Lord Stowell's judgment in Dalrymple: and that from that judgment the Lord Chancellor did not, in the slightest degree, dissent. In fact, the only law lord, who did so, was Lord Cottenham, who on this point, as on every other, adopted implicitly the reasoning of the Lord Chief Justice of the Common Pleas. Thus it will be seen, that the House of Lords was so far from repudiating Lord Stowell's doctrines on marriage *de jure*, that of the peers who took part in the discussion of them, four to one were in their favour. The only point decided was on marriage *de facto*, in Ireland.

3. *Catherwood v. Caslon*, (A. D. 1844). The marriage was between two British subjects, in Syria, in the house of the British Consul. The English ritual was read by an American missionary, who is assumed not to have been episcopally ordained. Every circumstance of publicity attended both the ceremony and subsequent cohabitation, and there was issue. The husband brought an action for crim. con., and obtained a verdict, with £200 damages; and on a motion in the Exchequer for a new trial, a special case was made for the judgment of the court. After argument, it stood over, to await the decision of the lords in *Regina v. Millis*; and on the 6th of July, 1844, judgment was given. We take the report from the best sources, to which we have access; and should it be found in any degree incorrect, we trust it will not be imputed to a want, on our part, of that unfeigned respect, which we entertain for the learned barons. It is stated to have been said; "It has been decided by the House of Lords in *Regina v. Millis*, that unless in the presence of a minister in episcopal orders, a contract *per verba de præsenti* does not constitute a

valid marriage, at the common law, of this country; and by the authority of that case we are bound."

We are but too sensible, that to doubt the judgment of so highly respectable a tribunal^(a) may expose us to the imputation of an overweening confidence in our own very humble attainments, but when we reflect, in the words of Lord Brougham, that "marriages innumerable have been contracted, both by sectarians in this country, and by persons of all descriptions in our vast possessions beyond the seas—possessions on which the sun never sets—all of which are now alleged to be void, all these parties fornicators and concubines, all their issue bastards," we feel, that we should be abandoning our duty to our readers, if we did not fairly and honestly state two objections, to which, after the most diligent and impartial examination, we think this judgment (as hitherto reported) is liable.

1. We submit with great deference, that the point for decision by the House of Lords in *Regina v. Millis* was not whether the presence of a minister in episcopal order, was or was not essential to the constitution of a valid marriage, at the common law. The Lord Chancellor, in that case, expressly said, "the immediate point for decision is, whether the defendant George Millis is, under the circumstances, stated in the special verdict, guilty of the crime of *bigamy*." One of the reasons, which his Lordship stated (and in our opinion by far the most weighty) was deduced, not from the *common law*, but from the *statute* of the 58 of Geo. III., c. 81., "the effect of which statute (he states) has been to change entirely the character of a contract *per verba de præsenti*, at least as to its temporal effects:" and among the circumstances stated in the verdict, was the date of the first marriage, which was subsequent to that statute. Now, as the house divided two and two, if one vote, out of four, was given chiefly (or but partly) on the effect of the statute, how can it be said; that the household determined a point of common law; more especially a point touching the effect at common law of a contract entirely changed by that very statute. It seems to

(a) Parke, Alderson, and Rolfe, Baron.

us that, on the issue stated by the Lord Chancellor, the prisoner had as much right to avail himself of a statute passed before both his marriages, as of the common law; and he did avail himself of a statute in argument: and that argument is acknowledged to have had great weight with at least one of the only two judges, who voted in his favour. Again, the Lord Chancellor held, that “the Spiritual Courts were the *sole* judges of the *lawfulness* of marriage, where that question was directly in issue”—that those courts considered a contract *per verba de præsenti* (without the presence of any minister) to be “a marriage” and that their opinions were “confirmed by *common-law* authorities, of the most respected and highest character.” How can it possibly be said then, that his lordship’s vote established, or helped to establish the doctrine, that such a contract was not a valid marriage, at the common law? A marriage pronounced by the sole judges of its lawfulness, to be lawful, has always been received at common law as valid and effectual. “The bishop’s certificate” (says the Lord Chancellor) “was *conclusive*.” “The law of those courts” (Says Lord Cottenham) “must have been at all times the law of the country.” “All titles whatever under a marriage,” (says Lord Keeper Guildford) “must even at *common law*, stand or fall by the sentence in the Ecclesiastical Court.” “A sentence in the Ecclesiastical Court,” (says Lord Hardwicke) “will be *conclusive*, and bind all.” A marriage *per verba de præsenti*, therefore, if duly certified by the bishop to be *verum matrimonium*, was necessarily held valid at the common law.

Now, how does this reasoning apply to Mr. Catherwood’s case? “In crim. con. and bigamy,” (says the learned Baron) “the plaintiff must show a marriage *in fact*; which, we think, is an actual marriage, valid, or voidable and not yet avoided;” and for this he refers to 3 Co. Inst. 88., where my Lord Coke says of the then only statute against bigamy (1 Jac. I. c. 11.), “This extendeth to a marriage *de facto*, or avoidable by reason of a precontract, or of consanguinity, affinity, or the like; for it is a marriage, in judgment of law, until it be avoided: and therefore, though neither marriage be *de jure*, yet they are within this statute.” Here then Coke plainly distinguishes

marriage *de facto* from marriage *de jure*. He does not say, the prosecutor *must* show the former ; he merely says the statute *extends* to it, implying that the prosecutor *may* show the latter. Again, he excludes from the term a marriage *de facto*, an “ actual marriage valid ;” for that is a marriage *de jure*. He means, as we humbly conceive, to say this—in support of an indictment for bigamy, it is not sufficient to show a marriage clearly void, both *de jure* and *de facto* (as for instance with a raving madman) ; you must show a marriage which may either be duly proved to the King’s Court to be valid *de jure* (by a recorded certificate of the ordinary, or otherwise), or else may appear, on the face of it, to be a marriage *de facto* ; for though the latter may be in truth void *ab initio*, in the judgment of the spiritual law (which can alone determine its essential validity), yet in the judgment of the common law it is a marriage, until it be avoided. Moreover, Coke does not say, that the only marriages *de facto*, which will support the indictment, are those voidable (that is, capable of being *declared* void by the Spiritual Court) by reason of any of the disabilities which Blackstone terms “ canonical ;” for, consistently with Coke’s words, an indictment might be supported by a marriage, which, on the face of it, would appear to a jury to be a marriage *de facto*, and yet, on examination in a Spiritual Court, would be found not to contain such a consent as forms “ the substance and indissoluble knot of matrimony ;” nor is this unlikely to happen, if “ marriages among particular sorts of dissenters ” (as Lord Mansfield expresses himself), or “ marriages according to any form of religion,” (in words of Buller), may, as against a wrongdoer, be sufficient marriages in fact. We admit that, as a trial for bigamy, and an action for criminal conversation, are both against wrong-doers, it is reasonable to hold, that a marriage, which would not support an indictment, in the one case, would, *à fortiori*, not support an action in the other ; but if the House of Lords had authoritatively ruled in the Queen v. Millis, that a marriage contracted in Ireland subsequently to the statute 58 Geo. III., c., 81. by a member of the Established Church, without the presence of an episcopally-ordained minister, was incompetent for either purpose, it does

not necessarily follow, that a marriage so contracted in Syria would be equally incompetent by the common law; and we trust that we have offered some not inconclusive reasons for holding that it might be competent.

2. But another point arises from the judgment in the Exchequer, which, we humbly conceive, is entitled to most grave and serious consideration. Were the proceedings in the House of Lords, in *Millis's* case, of such a nature as to bind the house itself, or any subordinate court, to the observance of any general rule or doctrine in the law whatever? We ask in no captious spirit, but with most deferential feelings to the high authorities concerned, and with an earnest desire to ascertain the safest and best rules of practice in the administration of the law.

“It is not in the nature of minds of men (says Lord Kenyon) always to see every part of an intricate argument in the same light.”(a) Therefore, in the opinions of collective tribunals, differences will sometimes arise, and the votes on a given point may be equally divided. In such a case, different systems of procedure have resorted to very different measures. In the civil law, the decision was for the defendant, or for the minor sum, or for the more favorable object.(b) In some tribunals the president has a casting vote.(c) In some, the number of members is augmented; as in the old *afforcement* of the *assize*,(d) or in a commission of adjuncts to the suppressed court of delegates, of which a remarkable instance occurred within our recollection. The court, at the first hearing, being divided 3 and 3, adjuncts were added; it was then divided 4 and 4, afterwards 7 and 7, and at last a majority of 10 to 5 being obtained, judgment was given.(e) In the Queen’s Bench, when the votes are equally divided, the judges think it right to state publicly the grounds of their respective opinions, but give no judgment.(f) On writs of error in the Exchequer Chamber, or the House of Lords, the course is to affirm the judgment below, on the ground stated in the minutes of the *Queen v. Millis*. Let us

(a) 7 T. R., 580.

(c) Voet, Pand., 42, 1, 118.

(e) *Henshaw v. Atkinson*, 1 Lee, 240.

(b) Paulus, D., 42, 1, 38.

(d) Bracton, 4, 19.

(f) 7 T. R. nt sup.

consider, how this ought, in sound reason, to operate on future cases.

The august assembly of the peerage sits judicially, as a court of ultimate appeal, the oracle of all subordinate jurisdictions, to ascertain the law, by which they must be governed. But when the house is equally divided, the oracle is dumb. In the particular case, it declines to interfere, and the cause reverts to the inferior jurisdiction, to be there dealt with according to the wisdom of the lower court. In this there is nothing remarkable; but it would be strange indeed, if, because the house was equally divided, such division should *settle* the law, according to the wisdom of the court appealed from. In *Millis's* case, the majority of the court below held the conviction wrong; it might have happened that they had held the conviction right, and then the very same division of the House of Lords, which actually took place would have settled the law directly contrary to what it is now taken to have done. We ask with great respect, would such a settlement of the law have bound the house itself? If so, the legal oracle is removed across the Irish Channel, and the Four Courts in Dublin are paramount to the judicial supremacy of the Peerage of the Empire.

The judgment of the lords (if judgment it must be called) was professedly a mere presumption—“*Præsumitur pro negante.*” Suppose the same point of law raised between other parties to-morrow in the Queen’s Bench at Westminster, and there decided by a majority the other way. Upon a new writ of error, there would be presumption against presumption. Must the House of Lords be for ever equally divided? And if so, must it stand like Garrick between tragedy and comedy, casting an eye alternately at the two rival benches, and sighing “How happy could I be with either?” Or must it alternately discard the Irish Lucy and the English Polly, according as successive writs of error afforded contrary presumptions, in favour of opposite denials? The subject is too grave for levity. If the affirmance in *Millis's* case is to have the binding effect ascribed to it, the same rule must be applied to every other equal division of the House, in its judicia

capacity ; and eventually the casting vote of a single Irish judge (possibly the least learned of a very learned body,) may give law to the empire, even though it should be contrary to the clear and unanimous opinion of the whole English bench and bar.

We are not aware, whether the House itself has ever laid down any rule for its guidance, in a case like that we are contemplating. We know not, that it is precluded, by any positive ordinance, or recognized custom, from examining to-morrow a doubt, which it has been unable to solve to-day; or from disturbing a doctrine, which Irish judges may establish, in opposition to the settled law of their predecessors and contemporaries. But if any such regulation or usage exist, we trust, that some noble and learned peer will bring it under their lordship's revision ; so that it may, at all events, be distinctly known, whether an exact equilibrium of the scales of justice, within the house, amounts to a permanent and irrevocable preponderance beyond its walls.

If it shall eventually appear, that the Court of Exchequer was not bound by the proceedings in the lords ; or that the lords did not mean to lay down the rule, which the learned barons understood them to have laid down, the remedy of the party aggrieved is simple. On the other hand, if the judgment in Mr. Catherwood's case be wholly unimpeachable, still as it is professedly related to his marriage, only in the character of a marriage *de facto*, the question of its validity as a marriage *de jure* remains still open, and the legal remedy is to be sought in the Ecclesiastical Court, which always had, and still has, exclusive jurisdiction of the lawfulness of marriage, when not under a statute, and when the question of its lawfulness is directly in issue. In that court, there are various kinds of procedure, to which the injured gentleman might resort. If for instance, he should institute a suit for nullity of marriage, it would be to be seen, whether Dr. Lushington or Sir Herbert Jenner Fust would pronounce for the nullity, independantly of the law of Syria, which may be laid out of the present argument. To hold it null *de jure*, by the law of England, would we humbly apprehend, be in direct opposition, not only to Lord Stowell, but to every eminent

judge of that bench, to every author of repute in their courts, and probably to every opinion, which the learned Dean of the Arches and Judge of the Consistory themselves ever gave on the point, as counsel at the bar.

Finally, if upon the fullest investigation, it shall be found (contrary to the numerous authorities we have cited) that marriages contracted on or beyond the seas, in places where no local law is known, and where an episcopally-ordained minister is not present, are void, both *de jure* and *de facto*, we can only call, with the greater earnestness, on members of the legislature to rescue British jurisprudence from so gross an inconsistency; and to give her Majesty's subjects in such situations, the same freedom, which the statute law of their country secures to them at home.—*The Law Review*.

THE UPPER CANADA JURIST.

IN CHANCERY.

(REPORTED BY ALEX. GRANT, ESQUIRE, REPORTER TO THE COURT.)

TUESDAY, 12TH AUGUST, 1845.

GAMBLE V. HOWLAND.

INJUNCTION—APPURTENANCES—C. being seised in fee of certain lands on both sides of the river Humber, erected grist and saw mills on the east bank of the river, and on the west bank a woollen mill or factory, situate some distance farther down the stream, and having leased the latter, together with, &c., subsequently thereto leased the grist and saw mills to certain parties who have since assigned to the defendant. At the time the lease of the woollen mill was made, a dam had been erected across the river by C. about a quarter of a mile up the stream, for the purpose of carrying the waters thereof to the grist mill and saw mill, but which it was said, still permitted sufficient water to escape for driving the machinery of the woollen mill, and which had been built by C., for the purpose of consuming the waste water flowing from the said dam; after the defendant entered into possession of the grist and saw mills, he erected a new grist mill, and threw a new dam across the river, lower down the stream than the old one, and of more perfect construction; in consequence of which in the dry season, the bed of the river had become almost dry, and the plaintiff was unable to work his woollen mill, whereupon he filed a bill and obtained a special injunction restraining the defendant from making or continuing, &c., any dam, &c., whereby the natural flow of the river might be prevented, &c., so as to injure, &c.; the water power of the woollen mill, and at any time heretofore used, &c., and which the defendant moved upon affidavit to have dissolved. Held, that the Court would not dissolve the injunction, but retain the same until the hearing or a trial had been had at law.

The bill filed, stated, that in 1834, Thomas Cooper was seized in fee of certain lands in the townships of York and Etobicoke, occupying the east and west banks of the river Humber; and that there were erected on the said lands certain mills, &c., namely, on the lands in York a grist and saw mill, and on those in Etobicoke a woollen mill or factory; that in July, 1838, Cooper leased the factory, *together with the water power, privileges, &c.*, to W. Irish, and W. Harris, for 21 years, and after passing through several intermediate assignees was assigned to the plaintiff, who entered, and is still in possession; that in 1838, or 1839, Cooper demised to the defendant the grist mill and saw mill, who entered into possession, and afterwards erected a higher dam than had been formerly used for the said mills, above the dam constituting the water power of the said factory; however, as the defendant did not then use more water than formerly, *sufficient was still left* to work the factory; but the defendant having a short time ago erected a new mill in place of the

grist mill, on an enlarged scale, with two additional run of stones, and other machinery, which required a greater power or supply of water, he at the same time excavated a new head race, and enlarged the tail race on the premises occupied by him, which the plaintiff had remonstrated against, fearing the injury to the water power of the factory; and that since the dry season had commenced, the water in the river had been so lessened in quantity thereby, as to render the said woollen mill or factory idle and useless; and that the plaintiff had applied to the defendant to discontinue the use of the said dam and head race, and to leave the matters in dispute to arbitration; charged damage to the plaintiff, and his intention of commencing proceedings in the Queen's Bench in respect thereof, and prayed injunction to restrain the defendants from making, &c., or suffering to continue any dam, &c., "*whereby the natural flow of the said river may be prevented, diminished or affected so as to prejudice, injure or impair the water power necessary for the use of the said woollen mills, and at any time heretofore enjoyed by the plaintiff or those under whom he claims.*" The affidavit of the plaintiff was to the same effect, and upon it a special injunction had been obtained, according to the prayer of the bill. Whereupon the defendant filed an affidavit, stating that in 1803 or 1804, the lands mentioned in the bill were owned by one William Cooper, who built the grist mill and saw mill in that year, and wrought them, until 1821, when he leased them to one Murchison, who enjoyed them for five months; that during all this time, the mills were supplied with water by means of an old log dam, remains of which still exist [a plan of the river, mills, &c., accompanying affidavits, exhibited the several dams mentioned in the pleadings]; That no other mills were erected on Cooper's lands, and Murchison therefore used all the water of the river during dry seasons; W. Cooper subsequently resumed possession of the mills; that in 1824, Thomas Cooper, son of W. Cooper, acquired a right to work the mills, and erected a new dam above the old one, and at the commencement of the head race, about a quarter of a mile above the old dam, and cleared and repaired the tail race; on 19th March, 1827, W. Cooper conveyed all his estate in lands, waters, &c., to Thomas Cooper, who used as much water for the mills as he chose, and afterwards rented the said mills to Hodgson and Harris, who entered, &c.; that in 1832 or 1833, during the said lease to Hodgson, &c., Thomas Cooper erected the woollen mill, on the opposite bank of the river, and that the object Thomas Cooper had in view in erecting the said woollen mill, was to use

the water which was allowed to escape by leakage from the dam, and the waste water when not required; that on the erection thereof, Thomas Cooper leased the woollen mill to W. Harris and W. R. Irish, with such water privileges as were then attached to the said woollen mill, and they entered into possession; and the plaintiff became assignee of the lease, on 27th March, 1845; that on the 21st July, 1840, Thomas Cooper made a lease of the grist and saw mills to defendant, for 21 years, renewable; the defendant thereupon entered into possession, and remained in possession ever since; that when the defendant made the agreement with Thomas Cooper, it was agreed that the defendant should use the lands as fully and freely as Thomas Cooper could have used them; and that no privilege had been or could be thereafter given to the lessee of the said woollen mill, by which he could interfere with the defendant's absolute right to the use of the water: that at the same time Cooper spoke to Henry and Scott, who were the lessees of the woollen mill, and advised them to purchase from the defendant a right to the use of a sufficient quantity of water for the factory, and that they offered £25 per annum therefor, which offer the defendant declined, and sometime afterwards Henry and Scott offered to bear a portion of the expense of erecting, &c., the new dam, upon the same condition, which the defendant also declined; that Cooper reduced the rent of Henry £25, in consequence of Henry having giving Cooper notice that he would relinquish; that he had been informed by the plaintiff that he occupied the woollen mill at such reduced rent; that the agreement for reduction had been reduced into writing, and was in the possession of the plaintiff; when the defendant took possession of the mills, they were out of repair, &c.; the defendant in 1842, constructed a new dam, and in 1844 erected a new grist mill; that the new dam is not higher than the old log dam, and the head of the water is not higher than at the upper dam; that the orifices of the new grist mill and of the saw mill as improved, are less than they formerly were; that the lessees, and particularly the plaintiff, have enlarged the woollen mill on a scale that in dry seasons it would require all the water in the river; that the new head race erected by the defendant receives its water from the old one, and the defendant has not enlarged the tail race; only cleared and repaired the embankment; and the present season is unusually dry, and the defendant has not had water enough to work both mills; and that since the injunction was served, the defendant had been occasionally obliged to stop his mills to prevent a breach thereof, having had very little water for the use of the

said mills. There were also filed affidavits of Robert Blythe, John Murchison, and other parties, corroborating more or less the statements contained in Howland's affidavit, and stating also, that in former years the grist and saw mills required more water than was in the river, so that at times only one could be used; and the defendant having given notice of motion to dissolve the injunction, the plaintiff filed additional affidavits, shewing that since the new dam was erected the bed of the river was drier than it was in former years, and that the right of the woollen mill to a supply of water not disputed as witnesses ever heard, and that the defendant's mill required more water than was formerly used for the old grist mill. Upon the motion coming on for argument this day,

Sullivan, with whom was *Crooks*, for the defendant,—considered the present case one of great interest, as well on account of the amount of property involved, as of the general principles of the law with respect to mills and the rights of owners to the waters flowing past and used by them; and also on account of the motion itself now under consideration. And in the latter view of the case, the first question that presented itself was, the propriety or expediency of the court granting this writ in a case where no irreparable damage could possibly ensue, by the defendant being allowed to continue his business; for if any damage did ensue to the plaintiff from the defendant using more water than was want to be used, it was a matter for the consideration of a jury, and who, in an action on the case, could give a verdict sufficient to cover any loss the plaintiff might sustain; while on the other hand, the defendant, who by having his business—which was a most extensive mercantile one—put a stop to by the injunction of this court, might and unavoidably would sustain great loss and damage, and would be without remedy against the plaintiff, the latter acting under the authority of the court. The law in England regarding the right to water as an easement, has not been as well and distinctly settled as the nature of the subject would lead one to expect. It might be as well to mention the principal decided cases, whether they bear directly upon the questions now in discussion or not, and when the cases have been followed throughout, and the principles which now prevail have been ascertained, these can be brought to bear upon the present matter in litigation, so far as they are applicable here. The counsel quoted and commented upon the following cases: *Saunders v. Newman*, (a) *Mason v. Hill*, (b) *Wright v. Howard*, (c) *Smith v. Cage*, (d) *Doe Freeland v.*

(a) 1 B. & A. 258.

(b) 3 B. & Ad. 304.

(c) 1 S. & S. 190.

(d) Cro. Jas. 526; Chas. 17, 57.

Burt, (a) Bell v. Harwood, (b) Longchamp v. Fawcett, (c) Webber v. Richards, (d) Acton v. Blundell, (e) Hall v. Swift, (f) Wynstanley v. Lee, (g) Frankham v. Lord Falmouth. (h) Upon a review of these cases, he thought the court would be of opinion, that a mere appropriation of water will not give the party using it a right to continue its use against any person who may be injured by the appropriation. An adverse or undisputed use of water in a particular manner for twenty years, will raise a presumption and indeed be conclusive evidence of a grant; had the land through which the river Humber flows, through and past the premises of the plaintiff and the defendant, being for twenty years in possession of adverse parties, their respective rights or want of right might be easily ascertained so far as the law is concerned; but in the present case, the whole lands originally belonged to William Cooper, and afterwards to his son Thomas Cooper, who is the lessor of the plaintiff as well as of the defendant. It would appear by the affidavits, as if the parties thought the fact of user for twenty years was important to be established or denied, but manifestly it is not; Thomas Cooper had the undisputed right of using the whole water within his land as he pleased, and the only question is, when he divided the land into separate tenements, what right of water was made appurtenant to these tenements respectively? Thomas Cooper in the first place had a saw mill and a grist mill, which required and used the water to a certain extent, to this extent the water became appurtenant to these mills, but what remained and no more was appurtenant to the cloth factory erected lower down the stream. It will be observed, that the lease under which the plaintiff claims does not convey the bed of the river, nor the water of the river, it merely demises the land by abutments and boundaries, bounded by the river; no common law right to half the water of the stream attached to this demise, the whole river and its bed were in Cooper; and it is only under the demise of *privileges* and *appurtenances* that the plaintiff can set up any claim to the water. What is or is not an *appurtenances* must be ascertained by evidence, it is not to be found by any rule of construction or general principle.—Acton v. Blundell, (i) Canham v. Fish. (j) The question here is, therefore, in what manner and to what extent was the water used in the factory occupied by the plaintiff when the lease was granted to his predecessor; this again is to be ascertained by the use of the water at the

(a) 1 T. R. 701.

(d) 12 Ad. & E. 442.

(g) 2 Swans. 339.

(j) 2 Cr. & Jar. 126.

(b) 3 Durn. & E. 308.

(e) 12 M. & W. 348.

(h) 6 C. & P. 529.

(c) Peake N. P. 71.

(f) 4 Bing. N. C. 381.

(i) 12 M. & W. 348.

grist and saw mills previously built and in operation. If the factory had only at the time of the lease what remained of the water after the mill was supplied, there was nothing in the lease to give it any more now; it is therefore of the utmost importance to inquire as to the manner and extent to which the water was used as apurtenant to the mills. Many years ago William Cooper erected a dam near to the place at which the defendant's dam now stands, this dam was destroyed, and in 1824 Thomas Cooper erected a dam a quarter of a mile farther up the river, and led the water by a race-way to the same mills; lately the defendant erected the present dam, near to the site of the ancient one, near the bridge; it is in evidence that these dams are nearly on the same level, and at all events that the new dam does not back the water to a higher level than either of the older dams. Again, it is proved that the sluice or aperture through which the water flows to the new grist mill erected by the defendant, is smaller than the apertures of the old grist and saw mills, the water being at the same or no higher level, it is manifest that no more water can pass now to the new mill than anciently passed to the old ones; the height of the several dams is of no importance except in this respect. It is also in evidence, that before the lease of the factory, in dry seasons, there was not enough of water in the river for the old mills, and that consequently only one of them could work at the same time in such seasons; the present season is admitted on all hands to be the driest within the memory of the witnesses, and thus we clearly show the use of the whole water of the river by the old mills. It is further proved, that the whole water of the river was in fact used in dry seasons, and in such seasons the factory of necessity would remain idle. It is very clear that the erection of a new wheel, or a new saw mill, will not destroy the right to use water, and that where a grant is presumed to use water in one mode, it will enure to enable the owner to use it in any other mode, and with any other machinery; the only question being, as to the extent to which the privilege is used, as affecting the water. It may be objected in this case that the new dam of the defendant is a better one than either of the old ones, that with a bad or leaky dam a portion of the water in the driest season would escape to the factory; the dam appears by the evidence to be better than the old ones, and would in dry seasons more constantly dam back the water; but it is clearly established in evidence that the occupiers of the grist and saw mills constantly endeavored to turn the whole water to the mills, and that the

whole was not sufficient in dry seasons. The use of water cannot be measured by the goodness or badness of a dam; the height of the dam, and the size of the aperture is the only guide; in other words, the capability of the dam and aperture to use or turn the water, is the only safe rule by which the use of the water can be measured. In *Alder v. Saville*, (a) this principle is clearly established; in that case the defendant, Saville, claimed the right to flow back water to a certain level, and it was proved that by the ancient dam the water was flowed back so as to irrigate meadows of the plaintiff, but that the dam was a bad one, that the mill used so much water as suddenly when in operation to leave the meadows dry, consequently they were not injured but rather served by the water; the repaired dam on the contrary, was staunch, and the machinery was so improved as to use water slowly and economically. The consequence was, that the plaintiff's meadows were drowned and destroyed, but the court upheld the defendant's right, provided the dam was not of a greater height, so as to overflow the meadows to a greater extent than was formerly done; his making the dam secure, and using the water more slowly, to the plaintiff's injury, was held not to be illegal. If, then, the owner of the land, Thomas Cooper, divided it into separate tenements, and by a dam and aperture sufficient when in repair to turn the whole water of the river in dry seasons to that tenement, made the whole water at such seasons appurtenant thereto, and afterwards erected another mill, on the other tenement, only what was not appurtenant to the first tenement could be an appurtenance to the latter, and the plaintiff having only that appurtenance by his lease could not complain, if in fact a greater quantity of water were used by means of a better though not higher dam. The plaintiff contends, that sufficient water at all times for the use of his factory was his right; this we deny, but even if it were so, it is in evidence that he has increased his machinery, and at present requires a much larger quantity of water than the first lessee used. This may be doubtful upon the evidence, but the court will only sustain an injunction where the facts are clear and almost undisputed. Again, it is in evidence that the plaintiff has raised his dam since the lease under which he claims was granted, and so much as to overflow the defendant's land. Thus his privilege of using the water upon which this injunction is granted, is used without legal right, and by wrong done to the defendant: if his dam were lowered to the height at which it was when his lease was made, his machinery could not work at all. Conse-

(a) 5 Taunton, 454.

quently, he has no right to the interference of this court to enable him to enjoy what he can only use illegally, and to the defendant's injury. The counsel here read and commented on the affidavits at length, and mentioned the cases as applicable to the several facts disclosed, he contended that the law and facts of the case were manifestly with the defendant, and even if they were doubtful, the extraordinary power of this court should not be used to maintain an uncertain claim, where no irreparable injury was sustained, when damages if any were sustained could be given by a jury, and when if the injunction should be wrongly granted, the defendant would have his mills stopped during the summer without any chance of redress. He contended also, that the injunction was uncertain; in one reading of it, it wholly postponed the defendant's right to the plaintiff's claim, it reversed the order in which the water could be claimed, leaving the defendant a mere remainder after the plaintiff should be satisfied. If the latter part of the injunction is to prevail, it means nothing but an enjoining the defendant not to do something illegal, what is legal or illegal in the view of the court not being in the least ascertained, consequently, the only safe course for the defendant was to stop his mills, and submit to manifest wrong; for he could not tell when by any use of the water he might be subjecting himself to process of contempt.

Blake, for plaintiff.—It would be unnecessary for him to follow the counsel who supported the motion, in much of their argument. With the law as laid down by Mr. Sullivan, he in the main concurred, and taking it to be clearly so settled as the learned counsel had stated, he had not noted a single case to cite to the court. But with a view of demonstrating in a few words the complete revolution which the law had undergone in relation to the mode of acquiring title to the elements, he would ask leave to read Sir W. Blackstone's statement of the law on the subject. "Thus, too, the benefit of the elements, the light, the air and the water, can only be appropriated by occupancy. If I have an ancient window overlooking my neighbour's ground; he may not erect any blind to obstruct the light; but if I build my house close to his wall which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me.

* * * * *

If a stream be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbor's prior mill, or his meadow, for he hath by his first occupancy a property in the current." (a) And singularly enough, Mr. Christian, in a rather

recent edition of the Commentaries, has said, that the entire law on the subject was contained in the text. Whereas in truth not a single proposition laid down by the learned commentator, can now be sustained. Property in the elements cannot in truth be acquired by mere occupancy, no matter how long continued. The elements, from their very nature, are incapable of actual occupation; and title to them can only be acquired by actual grant, or such a continuous user as would warrant a jury to presume one. But the rights which the proprietor of land, as such, acquired as to the elements of light and air, he argued, were different from the rights which the proprietor of land through which a stream flows, relative to the water. In the former case, the property which we have in the elements, gives no easement in the adjoining lands, no right to interfere with the use which the proprietors of those lands may choose to make of their own soil, no matter how materially such use may impede the ingress of the light or air to our close. But not so in the latter case; there the proprietor of the land through which a stream flows, has, he contended, a right to interfere with the use which his neighbour may wish to make of his own soil, if that use should change the level of the stream. He has indeed no right to prevent his neighbour from erecting any edifice, no matter how fantastic or unsightly, across the channel, provided he does not thereby injuriously alter the level of the stream, or its course through the adjoining lands; but the moment that the edifice, of whatever kind, does injuriously alter the level of the stream, either above or below, from that moment the proprietor who suffers by the alteration has a right of action, on account of the disturbance of the easement spoken of. Now assuming the law to be so settled, and it was not disputed by the other side, the court could have no difficulty in coming to the right conclusion in this case, had the grist mill occupied by Mr. Howland, and the fulling mill occupied by the plaintiff Mr. Gamble, been always in the occupation of distinct proprietors; for it would be then obvious that Mr. Gamble could have no right of action against Mr. Howland, simply because he erected an edifice across the bed of the Humber, a thing which he called a dam, provided that edifice did not disturb the level of the stream: and it can make no difference that the grist and woollen mills were at the time of Mr. Gamble's lease in the occupation of a single proprietor; for although Mr. Cooper might have turned the whole stream to the grist mill, and so made the water appurtenant to that, so far as his own property was concerned, still, not having in fact done so, having built a dam which in fact only turned half the

water to the grist mill, and left the other half to flow by the woollen mill *at the time* it was leased, it was quite obvious, he argued, that the lessee of the woollen mill, from the moment his lease was executed, would have a right of action, against Mr. Cooper, if he by any act of his should divert more than half the water of the stream. In other words, the quantity of water accustomed to flow to the woollen mill when the lease was executed, was appurtenant to that mill, and passed under the word *appurtenances*. And as it would be absurd to argue that Mr. Howland could use all the water of the Humber as against Mr. Gamble, simply because he had kept for twenty years an erection which he called a dam, to a certain height, but which in fact only diverted a small portion of the water, inasmuch as that would be absurd supposing these properties to have been always in the hands of different proprietors; so it would be equally absurd to argue, that Mr. Cooper had made *all the water* appurtenant to the grist mill, simply because he had erected a weir to a certain height, which in fact only diverted half the water of the stream. In this view of the law, nine-tenths of the evidence he read was wholly immaterial. The evidence of the defendant himself was ample to sustain the injunction; it not only did not displace the plaintiff's equity, but it established it; for it stood, he said, confirmed, that the dam erected by Mr. Cooper never diverted more than half the water of the Humber; and the only ground by which Mr. Howland's counsel had sought to dissolve the injunction was, that the present dam was not *higher* than the old one. But he did not care about the height, provided the new dam diverted water which the old one did not; that was the ground of the injunction, and stood in his estimation admitted. As to the arguments derived from the impolicy of stopping a trading concern, he would not trouble the court with any reply to them; they were directed against the jurisdiction altogether, which he considered was settled. He could not however forbear to observe, that unless the court would stop Mr. Howland's mill by injunction, in accordance with right, it was obvious that the defendant would stop a trading concern—Mr. Gamble's mill—in violation of right.

Fsten also for the plaintiff,—considered that the general principle upon which the plaintiff's case stood was, that a man cannot derogate from his own act. Mr. Cooper made a lease of something, and as stated by the counsel on the other side, we had only to ascertain what that was; for whatever was then conveyed, neither Mr. Cooper, nor the defendant who claims under him, could ever afterwards detract from such grant. On looking at the affidavits filed by the defendant,

we find that in 1838, a lease was made to Harris and Irish, (under whom the plaintiff) claims, of the woollen mill with the *appurtenances*; and one portion of those appurtenances according to the case in 2 C. & J., cited by the other side, was the flow of the water as it *was then running*, and therefore the lessor certainly had not a right to construct a new dam of such material and in such a manner as to deprive the plaintiff of the use of the water in as beneficial a manner as it was conveyed to him at the time of the lease. If Mr. Cooper, or those claiming under him, could erect such a dam as has been done in the present instance, he could with equal propriety have built a break-water, thereby throwing back the waters of the river at nearly all seasons, and so render the mill of the plaintiff entirely useless. The injunction does not stop the operations of the defendant's mill, it only forbids his turning the waters of the river so that the plaintiff shall be prevented from enjoying the same privileges as heretofore; whereass, were the injunction to be dissolved, the manufactory of the plaintiff would be completely stopped, and his damages could never be properly estimated by a jury. The present case is different from that of infringement of rights under patents; there, accounts are sometimes directed to be kept, so that the injunction can be withheld in the meantime, without any damage to the plaintiff. [Here *Esten* was stopped by the VICE CHANCELLOR, who intimated his opinion to be strongly with the plaintiff.

Sullivan, in reply,—Did not contend that occupation gave a right to the water, but maintained, first, that Mr. Cooper, as owner of all the property, had a right to use all the water, and appropriate it in such way as he thought best. Secondly, that he had appropriated it to the mills up the river, those owned by the defendant; and having so appropriated it, made it thereby appurtenant to those mills, and became a matter that could only be ascertained by evidence whether it was appurtenant or not; Mr. Gamble having no right to the water other than as appurtenant to the land conveyed to him, that is no right other than that acquired by user. There is no case in any of the books, where the *quantity* of water is considered to be the rule that governs, it is too uncertain: but in all the cases on the subject, the apertures through which the water escapes, and the height of the dam, is the true principle that governs. If this be not law, then on what ground had Saville, (in 5 Taunt.) a right to do what he never had done before, that is, to dam back the water in such a manner as to destroy the meadows he had only benefitted before?

Tuesday, 19th August, 1845.

The Vice-Chancellor gave judgment this day, refusing to dissolve the injunction, with costs.

IN CHANCERY.

8TH & 11TH JULY, 1845.

BROWN v. KINGSMILL. KINGSMILL v. BROWN.

PRINCIPAL AND AGENT—PAYMENT—SPECIFIC PERFORMANCE.

On the 7th June, 1839, John Brown filed his bill in this court against David Smart and William Kingsmill, for the redemption of a mortgage, bearing date the 30th September, 1825, made by Brown to one Jonathan Walton, and by him assigned to Smart and Kingsmill. Kingsmill and Smart, by their answer (filed in February, 1840), stated that the mortgage had been purchased by them with and out of the assets of one Robert Innes, deceased, whose executors they were, and claimed a balance. As matter of defence to the bill, and the plaintiff's right to redeem, the answer alleged, that through one James G. Bethune, as his agent, the plaintiff had contracted with Robert Innes, the testator, to sell to him the mortgaged premises and also a certain messuage with an acre of ground adjoining thereto, the whole being known as the Wilder Farm, for the sum of 500*l.* and that with the assent of plaintiff the testator had paid to J. G. B. for plaintiff, the said sum of 500*l.* by delivering to him bills of exchange on Scotland for 500*l.* sterling, which Bethune immediately negotiated, and from the proceeds thereof appropriated the sum of 500*l.* currency, to the use of plaintiff; that Innes had been put into possession of the premises, in pursuance and part performance of the contract, by Bethune, as the agent and with the assent and authority of the plaintiff, and that therefore Innes had become entitled to the equity of redemption &c. Upon this answer coming in Brown amended his bill. At this stage of the proceedings, Brown died, having made his will, and devised to his wife, Margaret Brown, who survived him, all his real and personal estate, and appointed her executrix of his will. On the 2nd of May, 1843, Margaret Brown, as devisee and executrix of John Brown, filed a bill in the nature of a bill of revivor, to have the benefit of the suit so instituted by John Brown, and the relief prayed for by him; to which the defendants filed their answer, and admitted the statements therein, and submitted that the suit should be revived, &c. On the 14th December, 1842, Kingsmill and Smart—as executors of Robert Innes deceased, Eliza Innes, the widow, and John Innes, William Innes, Robert Innes, and Janet Innes, the children of R. Innes, by Kingsmill and Smart, their next friends—filed a bill, in the nature of a cross bill, against John Brown, who died without having answered. On the 14th of April, 1842, the plaintiffs in the

cross bill, filed their bill against Margaret Brown, as devisee, &c., of John Brown, and on the 1st November, 1844, the bill was amended and filed, stating the mortgage from John Brown to Walton, and the assignment thereof to the plaintiffs Kingsmill and Smart, upon a purchase made by them, with and out of the assets of the testator R. Innes; also that Brown, being seized of a certain messuage, and the land thereto adjoining, containing about an acre, forming part of lot No. 33, in the Township of Hamilton, being on the north side of and abutting the road leading from Toronto to Kingston, and formerly in the occupation of one C. Wilder, under a lease, for one year, commencing from the 1st May, 1832, made by the said John Brown; that Robert Innes, deceased, contracted with Brown, through the medium of James G. Bethune, his agent in that behalf, for the purchase of the same, and of the land comprised in the indenture of mortgage, for 500*l.*; and that shortly thereafter, and in pursuance and part performance of the contract, Innes entered into possession, and the 500*l.* were duly paid to Bethune for Brown; that Innes afterwards died, having first made his will, whereby he devised his estate real, &c., to his wife, the said Eliza Innes, in trust for her sole use, towards the education of his children, and appointed Kingsmill and Smart his executors; that the executors had purchased the mortgage from Walton, and prayed that the plaintiffs might have a decree for specific performance of the contract against Margaret Brown, and that she might be decreed to pay the sum due on the mortgage to Walton, or that she might, out of the assets of the said John Brown, be decreed to pay the said sum of 500*l.* and interest, and give in an account of the estate of John Brown. Margaret Brown, by her answer, admitted the seizing of J. Brown in the premises, the mortgage and assignment, also the death of Innes and Brown, and that she was devisee and executrix of Brown as stated in bill; and that Bethune was, by some verbal understanding between him and Brown, the agent of Brown for the disposal of his lands, but denied that Bethune had any authority (as Brown's agent) to make the contract with Innes, stated in the bill, inasmuch as he was acting under precise instructions with regard to the land in question; or that he was authorized to receive the money from Innes, or to put him in possession; or that Innes did enter in pursuance of the contract alleged, but that on the contrary, he entered as tenant to Brown by assignment from Wilder of the lease from Brown to him; or that Brown ever acquiesced in the contract; and she also relied on the

Statute of Frauds. By mutual admissions entered into between the parties, it was agreed that the causes should be heard together, and that any facts, circumstances, or evidence in issue in either of the causes, should be considered in issue in the other for all purposes. It was also agreed that the following correspondence which was set out in the pleadings should be considered as proved, and might be used by either party on the hearing. The correspondence alluded to consisted of an extract from a letter written by Bethune to Brown, on the 16th September, 1833, in which he stated, "I shall probably sell your Wilder lot; shall I take 500*l.* cash? Let me know per bearer." Brown in answer wrote: "The Wilder Farm cost me more than 500*l.*, with the interest and expenses since I bought it. As times are turning out, take that sum if you can do no better. I ought to get 650*l.* for it." And the letters following:—

"John Brown, Esq., Dear Sir,—I received from Mr. Bethune the enclosed (of which retaining a copy); may I request you to send a written answer? As it is of some importance to have it in good time, the messenger is desired to remain for your leisure. Mr. Boulton wishes we would, as Mr. B. has returned home, so as to meet and explain this matter, to me a very unpleasant one. I have not yet done about my bills being on Jamaica dishonored.

Yours very truly,

(Signed) ROBT. INNES.

3rd April, 1834, Cottage, Hamilton."

"Cobourg, 3rd April, 1834.

John Brown, Esq., My dear sir,—Dr. Innes, who purchased the Wilder Farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid, I shall account to you for the amount, 500*l.* This transaction is entirely out of our other business. I sent the bills to Scotland through W. Bradbury & Co., and the moment they advise payment, I can draw for the amount.

Yours truly,

(Signed) J. G. BETHUNE.

If you will make a title to the land, and leave it with Mr. Moffatt, to be given up on your order."

"Port Hope, 4th April, 1834.

Dear Sir,—I have your favor, and enclosure from Mr. Bethune. In reply beg to say that I cannot make a title to the lot you purchased until I get the pay, there being a mortgage due to Jonathan Walton, Esq., of Schenectady, with interest, nearly 200*l.*, which must be first discharged. At

the time I consented to take 500*l.* for the lot, it was to be cash down; and were it not that I was in great want of the needful, I would not have offered it for any such sum; however, as the matter now stands, although much disappointed as I have been in not getting the pay at the time I expected it, I will take no advantage of you by demanding a further sum than the 500*l.*, with interest from the time you took possession from Wilder, although the rent I was getting much exceeded the interest. I hope it may not be long before the money comes to hand.

(Signed) JOHN BROWN."

"Dear Sir,—On reference to Mr. Bethune's letter to R. Henry, Esq., and the acceptance of the letter endorsed upon it, I am of opinion that Mr. Henry is liable as agent of the Commercial Bank, if the letter of credit mentioned in Mr. Bethune's note was accepted at the time the note was presented to Mr. Henry, and that Mr. Henry is bound to retain the sum of 500*l.*, mentioned in the acceptance, subject to your order.

(Signed) G. M. BOSWELL."

"New Lodge, 4th April, 1834.

Dear Robert,—Mr. Brown, being very urgent for the money for the farm purchased of him for Dr. Innes, I have to request, that if the order on you is accepted, you may pay Mr. Brown 500*l.*, and I will give you a bill for the same. I forwarded Dr. Innes's bills to Scotland, and did not negotiate them; they had been accepted, but I have as yet no account of the money.

Yours truly,

(Signed) J. G. BETHUNE."

"R. Henry, Esq."

"21st April, 1834.

Dear Sir,—At the request of Dr. Innes to call on you for 500*l.*, I enclose you copies of a correspondence between Mr. Bethune and yourself, and the opinion of Mr. Boswell on the subject, which documents Mr. Innes insists on me to take as payment for a lot of land I sold him, and for which he says he gave drafts to Mr. Bethune for payment. I expected the money long before this time, but never wanted it more than I do at present. Will you have the goodness to inform me if I may draw on you for the amount.

(Signed) J. BROWN."

"To R. Henry, Esq."

"Port Hope, 21st August, 1834.

Dr. Innes, Dear Sir,—I beg to inform you that I have, as I before told you, a payment to make on the 23rd instant. Mr. Bethune, when I last saw you at his house, promised to

let you have, about the time stated, at least 200*l.* I wrote to remind him, a few days ago. You will do well to call on him to-day or to-morrow, and see what you can do. If the sum of 200*l.* at least is not paid me on Saturday morning or before, I will give a deed to a person who has got the money, and is waiting the opportunity; and I think after waiting so long as I have done, and me so much drove for money; you cannot blame me. Should you fail in getting the money, the back rent must be paid to me next week.

(Signed) JOHN BROWN."

Evidence was taken in the cause, the purport of which appears in the argument of counsel, and the judgment of the court. [Amongst the evidence produced at the hearing, was the testimony of James G. Bethune, taken under a commission from the Court of Queen's Bench, in an action at law between Smart and Kingsmill, plaintiffs, and the late J. Brown, defendant. This evidence was objected to by the counsel of Margaret Brown, on the ground that the interrogatories were leading. On the other side it was contended that it was admissable, having already been used in the suit at common law, where no objection had been taken—citing *Williams v. Williams*, 4 M. & S., 497; *Wright v. Doe dem. Tatham*, 1 Ad. & E. 3. 19. The Vice-Chancellor over-ruled the objection.] Upon the cases coming on for argument—

Sullivan and Vankoughnet, for Margaret Brown.—In all cases for specific performance, the terms of the contract must not only be precisely proved, but must be proved as laid in the bill.—*Daniels v. Davison*, 16 Vesey, 249; *Savage v. Carroll*, 1 B. & B., 551. Here the contract laid in the bill is a sale for 500*l.*; the one proved is a sale for 500*l.*, to be paid by bills of exchange, at three and four months after sight, upon payment of which the purchaser was to receive a deed. The contract Bethune was empowered to make was for 500*l. cash*. Now a contract to sell for bills of exchange is not one to sell for cash. An agent is not authorised in making a contract such as the one shown here to have been made, when empowered to sell generally, more especially when told to sell for *cash*.—*Ward v. Evans*, 2nd Lord Raymond, 928; *Sikes v. Giles* 5 M. & W. 645. *Sikes v. Giles* is very similar to the present case, in its nature and circumstances. An agent is held to a strict performance of the power entrusted to him, and the court will not recognize any deviation however slight.—*Daniels v. Adams*, Ambl. 495; *Coles v. Trecothick*, 9 Ves. 249. The claim for specific performance must fail *in limine*. First, the contract made is not that stated in the bill; secondly, if it be, it is not the contract

Brown authorized his agent to make; thirdly, the contract between Bethune and Innes never was reduced to writing. At most Innes entered in pursuance of that contract, and not in pursuance of the one authorized by Brown, therefore there is no part performance of a contract binding on Brown. The taking possession must be with the knowledge and assent of the vendor, and must not be referrible to any other arrangement; if it can be so referred, it will not be considered part performance^(a). The evidence shews that Innes did not take possession in pursuance and part performance of any contract because the contract was not to be completed or considered binding till the notes were paid, four months afterwards. If the bills had been dishonoured, the contract could not have been enforced. Innes therefore entered in anticipation of the contract, and unless Brown subsequently distinctly by writing recognized the contract between Innes and Bethune, the case is clearly within the Statute of Frauds. But the entry of Innes into possession is referrible to something else than even that contract. The evidence shews that Innes bought out Brown's tenant that he might have a house into which to remove his family, and that he took possession with this object, and therefore not by way of carrying the contract into execution. It will be urged that negociable bills are cash: if they are, Brown was not to receive any benefit from those given to Bethune till months afterwards. The payment by Innes, if intended for Brown, was under the terms of the contract, premature, and Bethune was thereby made the agent of Innes.^(b) The correspondence contains no evidence of Brown's assent to Innes's act. It is contended that on the 3rd of April following the time of making the contract, Brown was first made aware of it by Bethune's letter, seven months after the sale took place; and Brown's letter of August shews distinctly that he would not ratify the contract. He was at that time, and his devisee is now, willing to make a conveyance, upon being paid the amount of the purchase money. The evidence establishes gross carelessness on the part of Innes, and that he afterwards acknowledged his error in having trusted entirely to Bethune. It was further contended, that the question brought forward by the cross bill had been already adjudicated upon and decided against the claimants, as it is shewn by the record of *nisi prius* (in evidence), that the executors of Innes had sued Brown to recover back the 500*l.* said to have been paid to him, and for damages for non-performance of the identical contract sought now to

(a) *Gunter v. Halsey*, Amb. 586; Foub. on Eq., B. 1 c. 3, s. 8 & 9, and note in Am. Ed; *Frame v. Dewson*, 14 Ves. 386; *Kern. v. Balf*, 2 B. & B., 348; *Charlwood v. Bedford*, 1 Atk., 497; *Lacon v. Mertius*, 3 Atk., 1; *Wells v. Stradling*, 3 Ves., 379.

(b) *Parnter v. Gaitskill*, 13 East. 432.

be enforced. A verdict was rendered for the defendant, thereby negating both the receipt of the money and the making of the contract, and the Court of Queen's Bench refused to disturb that verdict. A court of law was quite competent to decide the question, and the party having made his election, is bound by it. (a) If the court should entertain any doubt of Bethune's authority, it will direct an issue. (b)

Blake and Esten, for Kingsmill, &c. The contract, as set up by the plaintiffs in the cross bill, is recognized by the letters so as to satisfy the statute of frauds, and leaves the only question remaining, whether the purchase money has been paid? The contract is shewn to have been made by J. G. Bethune, who was authorized to receive the purchase money and to apply it to the use of Brown. Bethune did receive the money as agent of Brown, for having negotiated the bills, and their amount having been placed to his credit, a corresponding sum was thus placed at his disposal, and the amount of the purchase money he applied to the use of Brown, and paid the surplus to Innes. Independently of these facts, Brown assented to the arrangement made by Bethune, whereby the conveyance was to be given when the bills were honored, thus agreeing that the acts already done amounted to payment, provided they were not undone by the bills being returned. Brown having once assented to this arrangement, cannot withdraw his assent when he finds himself disappointed in receiving the money from the person to whom he trusted, and the bills having been honored, the plaintiffs are entitled to a conveyance. Suppose Innes had negotiated the bills, either with Bethune (who was then agent for the bank), or any other person, and out of their proceeds had paid Bethune the amount of the purchase money, and he had immediately remitted it to Bradbury & Co., and had the amount placed to his credit, Brown would then undoubtedly have been bound. The withholding the deed until the bills were honored did not prevent the present payment. The debiting Innes with the amount of the purchase money until the bills were paid, created only an apparent credit; the non-crediting Brown until that period was only matter of arrangement by Bethune, to guard himself from inconvenience in case the bills were dishonored, and did not affect the result worked by the present application of the money. The fact of Bethune being indebted to Brown, upon a final settlement, in a large sum for which he had to give a confession, does not prove that at the time of the sale the balance was not in favour of Bethune; for by the accounts rendered

(a) Mitf. Eq. Pl. by Jer. 253; *Behreus v. Pauli*, 1 Keen, 456; *Beames Orders*, 11, 117; *Cockerell v. Chomeley*, 1 R. & M. 418.

(b) *Story Eq. Juris*. 2 Fol. S. 1478; *Kern v. Balf*, 2 B. & B. 348; *Hollis v. Whiting*, 1 Ver. 159.

by Brown's own clerk and agent, it appears that sums, amounting to between £3,000 and £4,000, on account of land and other dealings, are charged against Bethune, between the date of the sale and the time when business transactions between Bethune and Brown are said to have ceased. The record of *nisi prius* cannot be taken as evidence that the jury found that Brown had not received the £500, for it is clear the plaintiffs in that action could not recover for money had and received, while they continued in possession of the premises; and it does not appear, nor can this court know, but that the verdict may have been rendered in favour of the defendant on the ground that in the opinion of the jury there was not any contract in writing within the Statute of Frauds that could be enforced at common law; besides, some of the letters now in evidence were not known to exist at the time of the trial at law. Citing Paley on Princ. and Agent, 171; and *Kirnitz v. Surrey* cited in note, 172, 3 and 4; and cases cited, 278, 280; *Stiles v. Cooper*, 3 Atk. 692; *Shannon v. Bradshut*, 1 Schol. & Lef. 73; *Favenec v. Bennett*, 11 East. 38.

THE VICE CHANCELLOR.—I take it as proved that, during the period of the proceedings out of which this suit arises, Bethune was the general agent of Brown for the disposal of lands, &c., and receiving payments; that he had for a considerable time been very extensively employed as such by Brown; and, up to a period subsequently to the commencement of these transactions, had possessed his implicit confidence. As such agent, some agreement had been made by him for the sale of some land to the testator Innes, known as the Wilder Lot, belonging to Brown; together with a small portion of land adjacent, with a house, &c. The nature and consequences of this agreement are now to be inquired into.

The questions are—was Bethune authorised in this particular case to contract for the sale to Innes; and, if so, did he perform his agency according to his authority; and, if not according to his authority, either in the letter or the spirit or contrary to both, was there such an acquiescence an adoption of his acts as to bind his principal; or, was the assumed deviation from the right line of his agency so entirely his own, or his own together with the pretended purchaser (especially in the act of receiving the purchase money or consideration), as to leave Brown unfettered by their proceedings; and whether there ever existed at all a contract binding, within the Statute of Frauds and the decisions of courts of equity?

I infer that the lands in question were among those which Bethune considered himself authorized to dispose of under his general power to sell; for his enquiry of Brown, in his note of September, 1833, relates only to price: "I shall probably sell your Wilder Lot; shall I take 500*l.* cash? Let me know by bearer."

The authority assumed by Bethune is certainly admitted by Brown, who, with reference to that inquiry, directs him to "take that sum, if you can do no better." There appears no mention of "cash" in this answer; but he adopts the proposition from the note of his agent, and it must be construed as though the direction had emanated from himself.

The confirmation of the agents proposal to sell the property for 500*l.* cash, and the subsequent conduct of the parties as to the mode in which the purchase money was paid, or alleged to have been paid, forms the principal difficulty in dealing with this case; there is no question however which, in point of time, arises before the date when that difficulty became apparent. It may be as well to dispose of it at once, and then return to the one involving greater perplexity.

The question is, the validity of the contract itself (a) It is contended that the agreement was a nullity in its inception, having been verbally made with Bethune, not at the time invested with proper authority; and that this invalidity was not aided by *any* such part performance as is here set up, because Bethune had no more right to deliver possession than an auctioneer selling an estate would have; that there could be no part performance of a non-existent contract. That, in fact, possession was taken by Innes not as a purchaser under any existing or even inchoate contract, but as the assignee of the lessee of Brown then in possession, with a view to a future contract for the purchase. It is in proof that the lessee, Wilder, who had a short period of his lease unexpired, had been bought out by Innes, and that Bethune had himself advanced the sum of 7*l.* 10*s.*, being the back rent due to Brown; that, as there was no agreement, therefore the possession could only be the continued possession of the tenant; and it is rightly argued, and irrefragable cases cited in support, that any act of part performance, whether possession or otherwise, to take a case out of the Statute of Frauds, must have manifest and unmistakeable reference to, and connexion with, the *agreement to purchase*, of which they profess to be a consequence; (b) that the possession here had obvious and sole reference to the right of the tenant which the plaintiff had purchased, but could have no reference to a contract which, with Innes's knowledge, was not made according to Bethune's limited authority, viz., for cash; that, though he had long retained possession, he had not entered under a contract. I do not agree in either of these views. It is true that, when Bethune enquired of his principal, shall I sell the Wilder

(a) Ward v. Evans, 2 Ld. Ray. 928; Parnter v. Gaitskill, 13 E. 432; Syke v. Gibbs, 5 M. & W. 645.

(b) Wells v. Stradling, 3 Ves. 379; Charlwood v. Bedford, 1 Atk. 497; Fonb. Eq. B. 1, c. 3, s. 8; Hollis v. Whiting, 1 Ver. 159.

Farm for 500*l.* cash? and he was directed so to do, it never could be imagined that it was for the contract alone that Bethune was to demand 500*l.* cash in hand, as if the estate could be sold and handed over like a portable chattel. The sale, it is true, was to be for cash; but the sale of an estate is a sort of equitable and legal compound, begun by the contract and perfected by conveyance; and it is only on the legal consummation that the party contracting to sell for cash could expect his cash payment confirmed: however, as Bethune's proposal to sell for cash was approved by Brown, I am by no means certain that this possession was at all necessary as an act of part performance, to take the case out of the statute; but, supposing it to be so, as it was taken after the contract and by the intervention of the vendor's agent, I cannot attach any importance to the fact that, to obtain possession of the land contracted for, it was necessary to buy out a tenant having a short unexpired term. Strong inferences were drawn from the fact that Bethune, the agent of Brown, paid the tenant the amount of rent which Brown himself was to receive: to have remitted or given a receipt for the rent due, might have been a simple course, but the tenant might have doubted Bethune's authority; and it is clear that Bethune was anxious that the unwillingness of the tenant to give up possession, should throw no obstacle in the way of the fulfilment of his contract with Innes, who was desirous to obtain possession.

I think therefore that there was a contract which even if not complete by Brown's affirmation, was certainly so by part performance, possession given by Brown's agent, and with his knowledge, followed by extensive improvements carried on within his frequent observation. It remains to see whether the conduct of the agent in conjunction with the purchaser in regard to the payment, was such as to deprive the purchaser of any right to specific performance on other terms, than of paying again to the vendor the purchase money, which it is admitted on all hands, was received by the agent.

It is contended that through the instrumentality of the purchaser, and against the known terms of the agreement, it was received by the agent in such a manner, as to enable him to apply it to his own use in fraud of his principal. On the other hand, that if after the contract, there were any deviation from the particular form of payment, it was one known and assented to by the vendor, and that he did in effect receive the purchase money.

It seems that not many days after the completion of the contract for sale, Innes, who seems to have dealt exclusively with the agent of Brown, with whom it would appear he had no personal acquaintance, drew two bills of exchange for £250 sterling, each, upon a person in Scotland, at three and

four months, in favour of Bethune, who, instead of endorsing them to Brown, transmits them to Bradbury, his agent in Montreal, to be sent to Scotland for payment. In the mean time there are placed to Bethune's credit by Bradbury, and when at maturity, are duly paid. The excess between 500*l.* sterling, and 500*l.* currency, is repaid by Bethune to Innes.

Had the case rested simply thus, and the proceeds of these bills come to the hands of Brown, or his authorized agent for him, before or at the time when Brown was prepared to give a deed for the land, it would beyond doubt, have been a sale for cash, within the literal meaning of the contract; but it is insisted that the intention was that Brown was to have the cash down upon the contract itself, and that Innes, by giving these bills to Bethune, enabled him to obtain the benefit of them, and therefore there was no payment to Brown.

As evidence that Brown was ignorant of the whole transaction up to the April of the following year—1834—a letter on the third of that month is produced, written by Innes to Brown,—(here his honor read Innes's letter, of 3rd April, 1834, Bethune's of the same date, and Brown's answer of the 4th addressed to Dr. Innes.)

That these bills had at this time been actually paid, was a fact concealed by Bethune from both Innes and Brown; but if Brown had been altogether ignorant all this period of upwards of six months, that Bethune had taken payment in bills, which could only be cash payment when paid, his anxiety shewn at the time of the contract to receive his money for the land which he knew was in the hands of Innes (whom he clearly acknowledged as purchaser) must have been suspended for some reason or other. If he were ignorant of any such payment by bills, a payment defeasible indeed by return of the bills, it is singular that no demand should, during this long interval, have been made upon Innes, for any payment other than what he had made. It is suggested in argument, that it is in the highest degree improbable that Brown, relying on a ready money payment, should consent to wait till March for the payment of the bills, yet we find him making no remonstrance at the non-appearance of the money, until the beginning of April, when this correspondence commenced, which I think must have originated in some application on the part of Innes to Bethune, surprised probably at not hearing from him that his bills had been honoured, and was then indeed directly misinformed and deceived as to the fact. Brown's ignorance of the taking of these bills is further inferred from the peculiar commencement of Bethune's letter, which might appear to have given the first intimation of the fact. Setting aside for the present moment the letters of Bethune, who then becoming immersed in difficulties, was playing a

disingenuous part probably to both parties, there is nothing in Brown's letter to shew that he was not fully aware that some mode of payment had been resorted to, which must for a time postpone the receipt of the "Cash down," and that he had hitherto been in hopes, as he states that he still is, that "before long the money will come to hand," for the first time appears one strong reason why he wished to get the purchase money before giving the title, which he says he cannot make until a mortgage of nearly 200*l.* shall have been paid off.

[Referring again to the repudiation of the contract, on the part of Brown, for whom it is contended that he never treated Innes as anything but a tenant standing in the place of Wilder, not only does this letter state that the land was purchased, but he draws the distinction between the rent which he had received from his tenant, and the interest on 500*l.* which he was to receive from the purchaser, and complains that he is a loser as the interest is less than what the rent amounted to.]

On the 21st April, 1834, Brown writes to Mr. Henry, (a person against whom Mr. Bethune had, or fancied he had, some pecuniary claim, out of which it seems he had offered to accomodate Mr. Innes, and enable him to satisfy Brown, —(see *Brown's letter of that date.*)

[Here again, so far from up to this period repudiating the contract because the cash was not paid for it, he is willing on the supposition that Mr. Henry had not yet paid the bills to draw on him.]

Pursuant to the accommodation which Mr. Bethune had promised to Innes, another letter from Mr. Bethune, written on the 4th of April to Mr. Henry, illustrates the plan he was carrying on to conceal from Brown (as well as Innes), the actual payment of Innes' bills, whether he (Brown) had known of their having been received or not, he writes—(see *Bethune's letter to R. Henry, Esq.*)

This letter, while it proves concealment and misrepresentation on the part of Bethune, proves also that he had no design ultimately to defraud his principal, for he here tries to obtain for him the money upon his own responsibility. He seems merely to have contemplated a temporary accommodation at the expense of much inconvenience on the part of Brown, and suspense and solicitude on that of Innes.

Brown, now weary with waiting to obtain the money, the receipt of which his agent had concealed, meditated rescinding the contract, and writes to Innes—(see letter from Brown to Dr. Innes, of 21st August, 1834).

The last expression seems to import that if 200*l.* be not paid by the day appointed, he will no longer treat him as owing 500*l.*, and interest from the day he took possession,

but will charge him rent for the use and occupation, probably alluding to the amount of rent paid by Wilder. This is the only evidence associating Innes with the character of a tenant in the mind of Brown, yet this is only a threat of what he would do, even had he the power of so transferring his purchaser. There is a good deal of evidence about Brown's revoking a contract no longer revokable, and exercising acts of ownership by cutting down timber, all which proves nothing, except that Brown committed a trespass, for which, while the contract subsisted, and Innes was in possession, he might have been punished in damages; the only question is, the contract having been complete, and the purchase money paid to the agent, was the payment made in such a manner as to bind the principal? If the agent were authorized to receive payment, whether he received it in bills or cash, does not appear to me to make any difference. If he received it in cash, it was equally in his power to misapply it, and if in bills drawn in his favour, which would become cash when paid, (and as this was to be a cash sale, Brown was not bound to make a perfect sale until they were paid), the result is the same. Is there any evidence to show that Innes, though he might contract with Brown's agent, had notice that he could not legally pay him? As between the purchaser and the vendor and his agent, I can see no irregularity or departure from the terms of the sale; for as already remarked, before the transaction could have matured into a sale, there was an actual cash payment in the hands of the vendor, through his agent; I say an actual cash payment, though through the misconduct of that agent, not actually in the hands of the vendor; but that cannot be visited upon the honest purchaser. As to the vendors's expressly consenting to his agent's taking bills in payment as before said, a defeasible payment, there is, except from testimony which has been impugned, no direct evidence; it is equally certain that there is no direct evidence against it, and I think the probabilities arising from the conduct of the parties, are in its favour.

Had the evidence of Bethune himself, taken in the suit at law, and used in the present suit, been entirely free from suspicion, the case would have been perfectly clear; for he swears that Brown was privy to the whole transaction, and that the amount, though at first placed to his (Bethune's) credit, was afterwards fully credited by him to Brown, not indeed *eo nomine*, as proceeds of those bills given in payment for land, but after explaining why he did not debit himself, at Cobourg to the amount to which he had been entitled at Montreal, until he should have ascertained that the bills had been actually paid,—reasons the goodness of which, or the badness, is unimportant, if the result be true; he says that he

made use of such credit in meeting Brown's liabilities, and that at this particular time Brown was in his debt.

Bethune has, unfortunately, himself furnished the opposing parties the strongest ground for questioning this evidence, by the several letters already referred to. It has been objected at the bar, that these letters not having been presented to the witness, when examined on oath, for his exposition (and certainly that equivocal note to Brown of the 3rd of April, 1833, might not impossibly have had a subtle object as regards Brown and Innes, as well as between himself and Brown) cannot now be used to discredit his testimony on oath. I admit that, had they been now for the first time produced for that purpose, the witness being no longer capable of examination, they could not have been received. But they have been received by agreement, and read in the cause, and their discrepancies must be allowed their full force; it must not, however, be forgotten that at the time these letters were written, he was entering into those inextricable difficulties which ended in his ruin and expatriation: 'a creditor, it might possibly be, of Brown, but a bankrupt to the rest of the world—actuated by a passion stronger than the love of truth. therefore departing from the truth—trying to keep up his falling credit by concealment and misrepresentation; yet, with regard to this 500*l.* not, I really believe, meditating any ultimate fraud against Brown, as shewn by his letter to Mr. Henry; for, as to Innes, when he reflected on the character in which he received his money as the agent of Brown, he might naturally have felt that he could not ultimately be the loser by his concealing for a time the payment of his bills.

On the other hand, when he made his depositions deliberately under the sanction of an oath, his personal liberty secure, he was to a certain degree beyond such influences; for he had passed the worst. He had a direct passing interest in *saying* what was untrue, but he had no apparent interest in *swearing* what was untrue. I should, therefore, believe him upon his oath, unless the probabilities were in favor of his previous statements.

Balances of accounts, as stated by him, have been referred to, in order to discredit him on that point; and, from the testimony of witnesses, it does not appear that they are sustainable, or that his mode of keeping his accounts was particularly satisfactory; but these are by no means conclusive. It is not improbable that the payments made for or on behalf of Brown may have absorbed the credit raised by the deposit and ultimate payment of these bills. The transactions between these parties were evidently pretty extensive up to the last, though it has been represented at that time to have almost entirely ceased, in order to render the application of so large a sum as 500*l.* to Brown's concerns a matter of improbability, in the

absence of any specific appropriation of such a sum appearing in the accounts. Between the date of Innes's bill, however, and the close of that year—1833—I find by the statement of the accounts between Brown and Bethune, drawn up by Wallace (a relative and clerk of Brown), that Bethune is credited with eleven several money payments on account of Brown, amounting together to the sum of 2117*l*. The balance on the whole account is in Brown's favor about 1673*l*.; but it is not certain that it might not have been greater by 500*l*., had it not been for the credits afforded by this same purchase money. Upon the whole, Bethune's statement is not improbable; it is on oath, and it has not been disproved. A *nisi prius* record has been put in to shew that the matter in issue has been determined by a covert of law, and that this court will not entertain a case which has been settled by a competent tribunal. If it were apparent that a single fact (out of which the whole equity arose), as whether there was or was not a contract, had been so determined, of course the court would not entertain it; nor, although issues of fact are so frequent in cases like the present, would it send such an issue, if it were clear that it had already been tried. But it is not apparent, nor do I see how the whole equity of this case could have been compressed within any issue at law. Neither do I understand how a plaintiff could succeed in an action for the recovery of money paid under a contract while holding possession by force of that contract. If he founds his right to possession on the agreement, it is, of course, only in a court of equity that he can enforce the payment of it. Looking at the whole case, the following facts seem sufficiently clear:—An agreement to purchase made with an agent authorized to sell and to receive the purchase money, that agreement ratified by the principal in writing, and the purchaser put into possession. Payment to the agent, who was certainly authorized to receive it, as between the vendor and purchaser, and who probably, as between principal and agent, received it in the manner and form in which he was, by his principal authorized to do, with the further probability that though this purchase money was at first placed to the private credit of the agent, yet that it ultimately went to benefit the estate of the principal; at all events, I see nothing to deprive the purchaser having honestly paid his money, of his right to specific performance, and the repayment of the money paid to relieve the property from the mortgage.

[GAMBLE v. HOWLAND.—NOTE.—Since the report of this case has been in the press, a trial of the action at law, has been had—His Honor the Chief Justice presiding—in which a verdict has been rendered for the plaintiff.]

NOTES OF LEADING CASES.

WHEN THE COMMUNICATION OF SLANDEROUS WORDS IN ANSWER TO AN INQUIRY IS PRIVILEGED AND THE LIABILITY ARISING THEREFROM.

GRIFFITHS V. LEWIS, EASTER TERM, 1845, 9 JURIST, 370.

As a general rule the liability of a party who uses and publishes of another expressions which amount in law to slander, does not at all depend upon the actual consideration of the particular motives prevailing at the time. It is enough that the words are found to be *per se* actionable, in order to warrant therefrom a legal implication of existing malice. To this general rule however there are some exceptions classed under the distinctive denomination of "privileged communications;" and when it is remembered that in an action on the case founded on statements of the latter description, the question of malice becomes an ingredient so essential to success, that it cannot, as in ordinary cases, be left to mere inference, but must expressly and in fact be proved, the importance of a decision tending to settle and define what is to be considered a "privileged communication," must unhesitatingly be admitted. Of this character is the decision in the case of Griffiths v. Lewis above referred to; and in now briefly adverting thereto, every observation will be limited to that particular kind of privileged communication, the nature and extent of which the case in question very accurately defines, namely, how far the communication of slanderous words in answer to an inquiry by a person who is interested in knowing whether they have been previously used or not, can be so considered. The first case to which it is necessary to refer, is that of Twogood v. Spyring (1 C. M. & R. 181). There the defendant, who was tenant of certain premises, for whom, in the capacity of a journeyman carpenter, the plaintiff in the action had been sent by the landlord's agent to do certain work, charged the plaintiff, in the presence of a person named Taylor, with being drunk, and having broken open his (the defendant's) cellar door. Upon the then denial of this charge, the defendant went and complained in similar terms to the landlord's agent by whom the plaintiff had been employed, and subsequently repeated in reply to an inquiry by Taylor, and in the absence of the plaintiff, that he was confident the plaintiff had broken open the cellar door. On this state of facts it was contended, in support of a motion for a nonsuit or new trial, that these were privileged communications, and that therefore the question of malice should have been left to the jury. After taking time to consider, the judgment of the court was delivered by Parke, B., in the course of which it is laid down, that the communication to the landlord's agent, and that made in the presence of Taylor, were to be

considered as privileged, but that the subsequent one made in the absence of the plaintiff to Taylor, could not be so considered. The ground on which the decision with respect to the first charge in the presence of Taylor rests, is that of its being made by one who was to be considered as standing in the relation of master to the plaintiff, and it may be well to quote a portion of the judgment relative to this point, as it will be found of some assistance in determining the practical application of the law. In *Griffith v. Lewis*, Mr. Baron Parke observes, "I am not aware that it was ever deemed essential to the protection of such communication, that it should be made to some person interested in the inquiry *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed, *Child v. Affleck* (4 Man. & Ry. 590 ; 9 B. & C. 403),) the simple fact that there has been some casual bystander cannot alter the nature of the transaction." And again, "the mere fact of a third person being present does not render the communication absolutely unauthorized, although it may be a circumstance to be left, with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant had acted *bona fide* in making the charge, or been influenced by malicious motives." The rule thus laid down has received direct confirmation in a decision of the Court of Queen's Bench in the case of *Padmore v. Lawrence* (11 Ad. & E. 380). As an authority on the question about which we are more immediately concerned at present, the case of *Twogood v. Spyring* goes no further than to establish what could hardly be matter of serious doubt, that the circumstance of a party's repeating a charge (privileged on the first occasion) of another, to an uninterested third person, in answer to an inquiry by the latter, does not protect him from the ordinary liabilities of an action on the case for slander. Another case bearing on the subject now under consideration is that of *Warr v. Jolly* (6 C. & P. 497), and was tried before Mr. Baron Alderson at the sittings in London, after Trinity Term, 1834. The alleged slanderous words in this case had been elicited by questions put by the plaintiff and his friend to the defendant, and they communicated the fact of defendant's wife having been cautioned by a third party against the plaintiff as a man of intemperate habits. On behalf of the defendant it was submitted that the words were privileged, having been used in answer to questions by the plaintiff, and the learned judge being of that opinion directed the jury that it lay on the plaintiff to show the existence of malicious motives on the part of the defendant, who thereupon found a verdict for the defendant. In this case it will be observed that the statement made (not

repeated, as in the previous case) related to something which had been said by another person to the party of whom the enquiry was made, and in this respect differs from that to which reference is about to be made: of this decision it will be seen the case of *Griffiths v. Lewis* is an extended confirmation. *Smith v. Matthews* (1 Moo. & Rob. 151), tried before Lord Lyndhurst, then Lord Chief Baron, at the sittings in London after Michaelmas Term, 1831, was a case in which, in consequence of certain statements made by the defendant, prejudicial to the plaintiff as a tradesman, he, the defendant, was called upon by the employers of the plaintiff to examine into the subject-matter of such statements, and thereupon repeated in a report what he had before said. The learned judge told the jury that, "if they believed the report originated with the defendant, and that what he had said produced the enquiry, the communication was not privileged. If they believed that it originated elsewhere; and that the defendant, being called upon to report, had *bona fide* made the statement, they should find for the defendant." Whereupon the jury found a verdict for the plaintiff.

Griffiths v. Lewis, above quoted, by which the foregoing principle is fully recognized, makes it further appear that the circumstance of a prejudicial statement being *repeated* in answer to an enquiry by the injured party, himself, does not alter the application of that principle. The defendant there it appeared, was applied to by the plaintiff, in company with another, to state whether he had been saying that the plaintiff, who was a butcher, used false weights, and that the defendant replied yes, and that he had been doing so for years. A verdict having been found for the plaintiff, it was contended, in support of a motion for a new trial on the ground of misdirection, that being a privileged communication, the question of express malice in the defendant ought to have been left to the jury, and in the course of the argument the previous cases were particularly referred to. The Court of Queen's Bench, however, expressed an unanimous opinion to the contrary. Mr. Justice Patterson says, "Where a person did not originate the words, and being applied to by the person whose character is affected by them, makes a communication in answer thereto, such communication is privileged. Where a party originates a slander, and afterwards repeats it, even in the shape of a report in answer, to a question by the person slandered, then, though made by him *bona fide*, and believing it to be true, he is liable, because he was the inventor of it." Again, Lord Denman, C. J., says, "The question really is, whether the utterance of slander once, gives to the party who uttered it a privilege of uttering it again when he is asked for an explanation. It is the constant practice for persons who have been

slandered, and wish to set themselves right, to take with them some friend, and ask the person who has uttered the slander, whether he used the words, and whether he will abide by them. Indeed, an action for establishing a person's character does not stand well without such a previous enquiry." His lordship then goes through the several cases, and concludes by stating that in *Smith v. Matthews* the correct rule was laid down.

The conclusion derivable from these cases would seem to set at rest all ordinary doubts as to how far a communication interrogatively obtained can be considered legally privileged. From the case of *Twogood v. Spyring* and *Padmore v. Lawrence*, as well as that of *Griffiths v. Lewis*, it is quite clear that the mere circumstance of a third party being present when a communication is made will not take away from it any claim to be considered as privileged which may otherwise exist. It seems, however, that there must be an interest in the subject-matter of the inquiry in the person making it; and the cases afford no *direct* authority for saying that any interest short of that possessed by the party slandered will suffice. All the cases clearly decide that the main point to be ascertained is, whether the party who, when interrogated, communicates the prejudicial statement, be himself the person from whom it originated, or whether, having heard it from another, he merely, to gratify the interested inquirer, discloses its purport. In the former case the liability of the party will result from the proof of the statement alone, whilst in the latter the success of the plaintiff in the action will depend on his ability to establish in addition the existence of malicious motives on the part of the defendant.

The case of *Griffiths v. Lewis* may be noted in 2 Selw. N. P. 11 ed. 1255, 1266; *Roscoe on Ev.* 5 ed. 395.—*Law Magazine*.

CONTRACTS OF INFANTS.

CHAPPEL v. ANNE COOPER, 13 M. & W. 252.

That an infant is liable upon his contract, where the supply of necessaries is the object of the agreement, is a proposition so well established that it would be mere pedantry to cite authorities in its support. It is obvious too that such things as relate immediately to the person of the infant, as his meat, drink, apparel, lodgings, and medicine, are necessaries for which he may be liable. And likewise authorities are not wanting to show, that, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, or religious information, may also be a necessary. So, again, attendance may be a necessary; and upon this principle, in *Hand v. Slaney* (8 T. R. 578), necessaries for the livery servant of an officer in the army were held to be necessaries for him. In all these

instances, it is to be observed, there is a manifest direct personal advantage from the contract derived to the infant himself. But the cases have gone further. In *Turner v. Trisley* (1 Str. 168), it was ruled by Pratt, C. J., that "necessaries for an infant's wife are necessaries for him." The grounds of this decision are not given in the report of the case. In Bacon's Law Maxims, 67 (edit. 1639), the author in illustrating the maxim "*Persona conjuncta æquiparatur interesse proprio*," says, "so if a man under the years of twenty-one contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy no more than if he had contracted for his own aliments or erudition."

This brief statement of the different classes of necessaries will suffice to introduce the case of *Chappel v. Cooper*, in which an entirely new question with reference to the liability of an infant came before the Court of Exchequer. The declaration was in the ordinary form, for work, labour and materials. To this the defendant pleaded infancy, and the replication stated that the goods were necessaries. It appeared that the plaintiff, being an undertaker, had by the defendant's order conducted the funeral of her husband, and that the husband had left no property to be administered. Upon this arose the question, was the infant widow bound by her contract for the funeral expenses of her husband? After time taken to consider, the judgment of the court was delivered by Alderson, B., and the process of reasoning by which the court came to the conclusion, that by analogy with and inferentially from the authorities already stated, the defendant was liable on her contract, can only be understood by an extract from the judgment itself. "This is the case of an infant widow, and the burial that of her husband, who has left no property to be administered. Now the law permits an infant to make a valid contract of marriage, and all necessaries furnished to those with whom he becomes one person, by or through the contract of marriage, are, in point of law, necessaries to the infant himself. Thus a contract for necessaries to an infant's wife and lawful children is used by Lord Bacon as one of the illustrations of the maxim, *persona conjuncta æquiparatur interesse proprio*." The learned baron, after citing the passage from Bacon's Law Maxims already given, and laying down the rule that decent Christian burial may be classed as a personal advantage, and reasonably necessary to a man, thus continues: "If then this be so, the decent Christian burial of his wife and lawful children, who are the *persona conjuncta* with him, is also a personal advantage, and reasonably necessary to him; and then the rule of law applies, that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence, from the proposition that the law allows an

infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children; and then the question arises, whether an infant widow is in a similar situation. It may be said that she is not, because during the coverture she is incapable of contracting, and after the death of the husband the relation of marriage has ceased. But we think this is not so. In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end for some purposes. But if the husband can contract for this, it is because a contract for the burial of those who are *persona conjuncta* with him by reason of the marriage, is as a contract for his own personal benefit, and if that be so, we do not see why the contract for the burial should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract, and her infancy for the above reasons is no defence, if her contract be for her own personal benefit. It may be observed that, as the ground of our decision arises out of the infant's previous contract of marriage, it will not follow from it that an infant child or more distant relation would be responsible upon a contract for the burial of his parent or relative." (a)

Out of this decision are evolved two points for the first time decided, for it is obvious that two steps must be taken by the court to come to the conclusion at which it arrived. 1stly. Every man's right to be decently interred will hardly be denied; but does the consequence follow that a man's funeral expenses are necessities for him which an infant may be made liable? By a slight extension of the rule, *as to what are necessities*, an infant's funeral expenses are for the first time construed to be comprised within it. 2ndly. This case affords a new illustration of the maxim cited from Lord Bacon's work. It shows the operation of that maxim may for some purposes continue even after the relation which gave it efficacy has ceased to exist. The court proceeded upon the principal that there grows out of the contract of marriage a continuing identity, which survives the death of one of the parties; and concluded that as the husband's funeral expenses were necessities for him, so *his* funeral expenses were necessities for the wife, and consequently, she having contracted for them, her infancy afforded no defence. From this case it appears the funeral expenses of a lawful child are personal necessities for which an infant parent may be sued. Note this case in Chitty on contracts, p. 144.—*Law Magazine*.

(a) The common law imposes upon the individual under whose roof a person dies, leaving no effects, as in this case, the obligation of defraying the expenses of decent burial. *Reg. v. Stewart*, 12 Ad. & Ell. 773.

THE UPPER CANADA JURIST.

LIABILITY OF INFANTS IN RESPECT OF CONTRACTS, AND THEIR LIABILITY FOR TORTS.

At first sight there appears such a clear distinction between contracts entered into by a person on his own behalf, and contracts on the behalf of another, that it might be thought that it was needless to do more than to state that such a distinction exists, but the case of *Zouch v. Parsons* (Burrows, 1808) shows that it is necessary to keep this difference in mind, whilst considering the effects of contracts and deeds entered into by infants.

As regarding then his power to contract as agent on behalf of another, it is clearly established (Co Lit, 52 a) that an infant may act as agent for another person, and can carry out the authority entrusted to him in the same manner as an adult, and there is no difference whether the act entrusted to him to do is a judicial or a ministerial act.

The case of *Zouch v. Parsons* (Burrows, 1794) is an important illustration of this principle. It was there held that a re-conveyance of mortgaged premises, by an infant mortgagee, on whom the land had devolved as heir, was binding on him on the ground that he was a mere trustee to re-convey the mortgaged premises, on the mortgage being paid off, and therefore that the conveyance was an act not touching the interests of the infant; and although Mr. Preston, in his edition of *Sheppard's Touchstone*, p. 56, states that this decision could not safely be relied on, the doubt there expressed is as to whether the interest of the infant was, or was not affected by the conveyance, and not as to his power to convey, supposing he had no personal interest in the premises.

The statute of 1 Will. IV. c. 60, s. 6, has been subse-

quently passed, under which infant mortgagees may reconvey under the direction of the Court of Chancery.

On the same principle it follows that an infant may execute a power *simply* collateral, that is to say, a power to dispose of or charge an estate in favour of some other person, the infant not having any interest, or taking any estate, in the land. (Sugden on Powers, 45, 6th ed.)

A devise of lands to an infant to sell where the will passed only a naked authority would be a power of this instance, and one which the infant might execute. (Dyer, quoted in Sugden on Powers 46.)

The question, however, whether an infant could execute any powers which are appendant or in gross, and not simply collateral, has been discussed in Sir Edward Sugden's Treatise on Powers, p. 215, 6th ed., and it will be seen that it is considered as clearly settled by that learned writer, that such powers cannot be executed. This opinion is in accordance with the views that have been already expressed (ante, vol. xxxi., p. 126), when treating of those contracts which affect the infant's own interest.

It follows, from what has been already said, that an infant can at any age act as agent for a third party, unless prevented directly or indirectly by some statute law. Many statutes have however prevented him from acting till he arrives at age; thus he cannot act as administrator during his minority, because he is incapacitated (for the reasons already stated, ante, vol. xxxi., p. 136) from entering into the bond as required by the statute 22 and 23 Car. II. c. 10, s. 1, for the due administration of the intestate's effects, and consequently by the practice of the ecclesiastical courts (Williams' Executors, 333, 2d ed.) administration is granted to another, duante minore ætate. So also by the statute 38 Geo. III. c. 87, an executor cannot act till of age, although he may be appointed executor at any age. Previously to that statute, the law had considered him incapable of acting as executor until the age of seventeen (Pigott's case, 5 Co. 29 a), a limitation peculiarly necessary, for as the appointment by the testator is never intended to take effect immediately, but only on his death, it must be presumed that he did not

expect that the infant would be called upon to act till he had arrived at an age capable of undertaking the duty which the common law had fixed at seventeen years of age, but the statute law now at twenty-one.

So he cannot act as a public attorney to prosecute suits, as by the laws regulating attornies, which have existed from the earliest times, he is prevented from acting till of age. Co. Litt. 52 a, note 2.)

Having treated of the effect of contracts entered into by infants, as well on their own account as also as agents for others, it remains to state, that their *contracts* must be distinguished from their *acts*, for an infant has capacity not only to do many things, and which, when performed, he cannot undo, but there are also many things the court will compel him to do. It is proposed then to consider—

THE CAPACITY OF AN INFANT TO ACT GENERALLY, INDEPENDENTLY OF HIS POWER TO CONTRACT.

Lord Coke (Co. Litt. 172 a) lays down the rule that, whatsoever an infant is bound to do by the law, the same shall bind him, albeit he doth it without suit at law.

In Fortesque (18 Hen. VI. fol. 2a) the same rule is expressed thus, that if an infant doeth that which he ought to do, the act is good; therefore the attornment of an infant to a grant by deed is good, because it is a lawful act, albeit he be not, upon that grant by deed compellable to attorn. (Co. Litt. 315 a.)

It has been already said that an infant is never liable to be sued in a court of law on his contract, laying aside his contracts, for necessities, but there are many cases in which a court of law would compel an infant to do certain acts, as to admit a copyholder (Coney's case, 7 Rep. 35 b), and make a partition; and therefore if an infant does these acts, they will be good and bind him. So in the case of Zouch v. Parsons, (3 Burrows, 1808), it is said, that if under an act of parliament an infant could be compelled to make a conveyance of a trust estate, such a conveyance would be binding on him, although not made under the authority of the statute.

The rule laid down in Fortescue is rather wider in terms, and includes certain cases which would not fall within the

rule laid down by Coke, as the case of an attornment above quoted (Coney's case, 9 Coke), which is an act that he is not absolutely bound by law to do, but which he ought to do.

Payment of rent by an infant is quoted as an instance of an act which is valid, because it is one which he is bound by law to do, and no doubt the payment is good, and could not be recovered back after the enjoyment of the land ; but the reason of this is rather because the infant cannot remit the other party to the same state as he was before the occupation of the land by the infant, and it would be an injustice if the law assisted him to undo what he had done.

The infant, it has been shown (ante, vol. xxxi., pp. 119 and 140), is not compellable by law to pay the rent even after use of the land ; therefore the act is not valid on the ground that the act was one which the lord could compel him to do. An infant is bound to perform a condition annexed to his estate ; therefore the performance of the condition is necessarily good (Whittingham's case, 8 Rep. 88 ; Co. Litt. 233 b) ; for if an estate is given to an infant on a condition to be performed by him, and the condition is broken during the infancy, the land is lost forever (Vernon v. Vernon, cited in 1 Vesey, jun. 453). So he may present or nominate to a benefice, as the law requires the benefice to be filled up.

Marriages by infants are also instances of the validity of their acts, for at common law, a male infant could marry at fourteen, and a female at twelve ; and, at the present day, unless the marriage acts are violated, a marriage at those ages is valid, although a *contract* to marry by an infant would have no effect, and no action for the breach of the contract would lie until a ratification after age. (Ante, vol. xxxi., p. 121.)

As a male infant may lawfully marry at fourteen years, it may become important to consider whether by such an act he becomes liable to all the debts of his wife, contracted by her previously to marriage, to the same extent as if he had been of age. It is believed that there has been no judicial decision on the point, although there is a dictum of Pratt, C. J., in *Turner v. Frisby* (1 Stra. 168) which would probably be upheld at the present day), that the infant would not be liable to the debts of his wife contracted by her previously

to his marriage. It is quite inconsistent with the privilege of infancy, as already explained, to hold that an action could be sustained against him upon a contract entered into by his wife before marriage, while for his own contract no such action could be brought. (See ante. vol. 31, p. 119.)

It is clear that the wife could not be sued alone, for her debts contracted before marriage, and if the action was brought against the husband and the wife jointly, the better argument seems to be, that the husband could plead his infancy at the time of the marriage in bar of such action.

If the wife was sued alone and failed to plead her coverture in abatement, *she* would not be allowed to take advantage of it at any subsequent stage of the cause, and might, therefore, eventually be taken in execution for her own debts (see Tidd's Practice, 1026, 9th edit.); yet, nevertheless, if she pleaded her coverture in abatement, which would unquestionably be a valid plea, it would follow that neither herself nor her husband would be liable for such debts as long as the coverture lasted, and after six years the statute of limitations would be a complete bar to these demands had it commenced to run before the marriage.

It seems, that in case of a recovery against a wife as a feme sole, the husband may, if he chooses, bring a writ of error at any time, since he is prejudiced in the loss of the society and comfort of his wife, and is thereby a party injured by the judgment. (Bacon's Abridgment, Error, 67; Baron and Feme. L.; Rolle's Rep. 63; 3 T. R. 631.) The court, however, will not discharge the wife, if taken in execution, on her application, but will put the husband to his writ of error. (Cooper v. Hunchin, 4 East, 521.)

As a further consequence of the *act* of marriage all the personal estate of an infant female will vest in the husband precisely in the same manner as if she was of age, and it is on this account that the settlement (2 R. & My. 376) by an adult made on the marriage with an infant female is valid, and will operate over all the personal estate of the wife, including not only the property which would have actually vested in the husband on the marriage, but also over those choses in action which the husband by the marriage be-

comes entitled to reduce into possession (*Ashton v. M'Dougall*, 5 Bevan, 56); and including also her chattels real (*Trollope v. Linton*, 1 S. & S. 477), over which the husband by the marriage has a *jus disponendi*.

It seems, however, that the settlement would have no effect over such choses in action which the husband did not become entitled to reduce into possession *during* the overture. (*Ashton v. M'Dougall*, 5 Bevan, 56; *Horrey v. Ashley*, 3 Atk. 616).

As to the effect of marriage upon the real estate of the infant female, any settlement by herself would, for the reasons suggested in the former part of this article (*ante*, vol. xxxi., p. 126, et seq.), be inoperative; and the settlement (*Clough v. Clough*, 3 Wood, 453) by the adult husband would only take effect upon the limited interest which he acquires by the marriage, and, therefore, quite ineffectual towards making my settlement of the property.

A settlement by a male infant of his real or personal estate, although in consideration of marriage, can have no further effect than any other of his contracts affecting his own interest, and which has already been explained. (*Ante*, vol. xxxi., p. 127, et seq.)

Settlements, it must be observed, on marriage, are usually and almost necessarily effected by deed, and, therefore, a settlement by a male infant of his real or personal estate, or by a female infant of her real estate, would come within the first class of contracts and operate accordingly; and as it appears that deeds may still be ratified (*ante*, p. 137), either by parol or acts confirming the deed, after age, settlements though made by infants may frequently be supported both at law and equity when so *ratified and confirmed*.

The case of *Ashton v. M'Dougal*, reported since the foregoing part of this article was written, in 5 Bevan's Reports, page 56, supports the opinion already expressed of the power of an infant to ratify a deed after age. The judgment of the Master of the Rolls in this case assumed that a settlement made by a female infant on her marriage of her reversionary interest in choses in action which had not been reduced into possession by the husband during the marriage, was not binding on her, in the event of her surviving him, yet it was

held that the wife might adopt and ratify the settlement after the death of her husband by not calling for a transfer of the funds; thus expressly deciding that acquiescence after age will support a deed which originally passed no interest, as being the deed of an infant.

Mr. Jacobs, in his edition of *Roper on Husband and Wife* (vol. ii. p. 26), has so clearly expounded the law of settlements by a minor on his or her marriage, and the passage is so confirmatory of the doctrine which has been ventured to be put forth in this and the preceding article, as to the effect of contracts of infants, and of their power to ratify deeds when of age, and also of the effect of the act of marriage upon the property of the female infant, that we may be excused in inserting it somewhat at length :

“ A settlement on the marriage of a female infant will,” says Mr. Jacobs, “ also bind her personal estate, whether “ consisting of property, which would upon the marriage vest “ absolutely in the husband, or of choses in action or leasehold “ estates, which would survive to her, if not reduced into “ possession, or assigned by the husband. (*Harvey v. Ashley*, “ 3 Atk. 607; *Trollope v. Linton*, 1 Sim. & Stu. 477.) On “ the other hand, it is now held (*Durnford v. Lane*, 1 Bro. “ C. C. 106; *Milner v. Lord Harewood*, 18 Ves. 259; *Trol- “ lope v. Linton*, 1 Sim. & Stu. 477), after considerable fluc- “ tuation of opinion (see *Cannell v. Buckle*, 2 P. W. 243; “ *Harvey v. Ashley*, 3 Atk. 607; *Lucy v. Moore*, 4 Bro. P. “ C. 343, ed. Toml.; *May v. Hook*, Co. Litt. 246 a, note; “ *Peirson v. Peirson*, cited 1 Bro. C. C. 115; *Clough v. “ Clough*, 3 Woodeson, 453; 3 Ves. 710), that a settlement “ on the marriage of a female infant will not bind her real “ estates. Although a settlement of a female infant’s real “ estate is not binding upon her, it will be binding on the “ husband, and will therefore prevent him from joining in “ any other disposition of the estate during the coverture. “ (*Durnford v. Lane*, 1 Bro. C. C. 106; see 18 Ves. 276.)

“ If the husband be an infant at the time of the marriage “ it may be presumed, for the same reasons which apply to “ the case of a female infant, that a settlement of his real “ estate would not now be held to bind him. There are two “ cases in which a different view of the question appears to “ have been taken (*Strickland v. Coker*, 2 Ch. Cas. 211, cited “ 3 Atk. 614; *Warburton v. Lytton*, 176 1, cited in *Lytton v. “ Lytton*, 4 Br. C. C. 440; see *Sloccomb v. Glubb*, 2 Bro.

“C. C. 545); but it is possible that they may have turned upon acts confirming the contract done by the husband when of age.

“The principle on which the validity of marriage settlements of the personal property of female infants appears to rest, does not apply to similar settlements of the personal property of male infants.”

The reason why an infant female is bound by a legal or equitable jointure before marriage is quite independent of her *capacity to contract*, because the law, on this subject has arisen upon the construction of the statute of Hen. VIII; and the question as to the validity of the contract turns upon the fairness of the transaction. (1 Roper on Husband and Wife, by Jacob, 475.)

Since the preceding pages of this article were written, the case of *Chapple v. Cooper* has been decided in the Exchequer (13 Mees. & Wels. 252), where it was held that the burial of a deceased husband, who has left no executor and no property, is a *necessary*, so as to render his infant widow liable for the expenses of it. This decision appears to be quite consistent with the definition of *necessaries* attempted to be given (ante, vol. xxxi. page 123). It would not, therefore, have been requisite to have noticed this case here, except for an observation of the court in the judgment delivered by Alderson, Baron, by which it might be inferred, that it was considered by the court that the contract for the funeral of the husband was similar in principal to a contract of marriage. The court said, “that a decent Christian burial of an infant’s wife is a personal advantage, and reasonably necessary to him, and then the rule of law applies that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children.” And again in a former part of the judgment the court says, “the law permits an infant to make a valid contract of marriage.” (13 Mees. & Wels. 259.)

It can hardly be said that marriage is a necessary thing for an infant, and it has been endeavoured to be shewn in the
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former pages that contracts for necessities are the only contracts which bind the infant.

That the marriage of an infant is a valid act cannot be contradicted, but it has been already seen (ante vol. xxxi. p. 121), that a promise of marriage by an infant is not binding. It is therefore submitted that it would be more correct to say, that a *contract* of marriage is invalid, and is precisely the same as all the other contracts of an infant which are not *apparently* beneficial to him (see 2d class, ante vol. xxxi. p. 132), but that after the performance of the marriage ceremony, the act of marriage is distinguishable from the contract, and is an act which he cannot undo.

Another instance of the capacity of infants to act is exemplified in the power which they formerly possessed of making a will of personalty at the age of fourteen years, and which still exists as to all wills made prior to the 1st of January, 1838. Now, however, by the statute 1 Vict. c. 26, no person under the age of twenty-one years can make any testamentary disposition whatsoever, even to appoint a testamentary guardian.

Whether an infant can take the benefit of the Insolvent Act has been more than once raised, without being decided.

In the case *Ex parte Deacon* (5 B. & Ald. 759), it was said in argument that minors were daily discharged, and the court seemed to acquiesce in the proposition that they might legally be so, although it had no reference to the case under discussion.

The 87 sect. of the 1 & 2 Vict. c. 110, enacts, "that before any adjudication shall be made with respect to any prisoner, the said court, or commissioner or justices, shall require such prisoner to execute a warrant of attorney to authorize as entering up a judgment against such prisoner." It will be seen then, that the statute makes a warrant of attorney essential to the validity of the discharge. The enactment itself cannot be construed as enabling a party to execute a warrant of attorney, who is incompetent by law to do so; and the decision in *Ex parte Deacon* (5 B. & A. 759) established this, when it decided that a married woman could not be discharged because of her incapacity to execute the warrant of attorney.

The court there, in drawing a distinction between the contracts of a minor and a feme covert, is reported to have stated, "that the acts of a minor are not necessarily void, voidable only, and that a minor may execute a deed for his own benefit. But a married woman cannot comply with the conditions of the act, and therefore the commissioners have it not in their power to discharge her."

This dictum of the court as to the validity of an infant's deeds was ex-trajudicial, and if the reasoning is correct which has been urged in a former page, (see ante. vol. xxxi. p. 128) that the deed or other contract in pais of an infant has no validity in any case beyond his minority, this distinction between deeds of married women and infants could scarcely be supported. In addition however to the above reason, it has been distinctly held (*Sanderson v. Mar*, 1 H. B. 75; *Wotteux v. St. Obin*, W. Black, 1133), that a warrant of attorney given by an infant is absolutely void. If, then, the infant cannot comply with the condition, it would follow that no certificate of discharge would be valid, whether it was obtained on his own petition or on the petition of a creditor.

As to the bankruptcy of an infant, it has been held (*Belton v. Hodges*, 9 Bing. 365), that a commission issuing during his minority is absolutely void, because at any rate he was incapable of contracting a debt during his minority. (See ante, vol. xxxi., p. 133.) The Lord Chief Justice Tindal expressly guards himself from expressing any opinion as to whether a fiat could be taken out against him after age, on a subsequent ratification of the debt. Supposing the effect of the ratification is to set up the debt ab initio, as has been formerly suggested (see ante, vol. xxxi., p. 137), then there would appear no reason why, on a subsequent trading and act of bankruptcy (see *Rex v. Cole*, 1 Ld. Raym. 443), the fiat should not be supported.

Another rule is, *that an infant can do no act which delegates a mere power and conveys no interest* (see *Perkins*, 12; *Lord Mansfield*, *Burrows*, 1808), as a letter of attorney, which is therefore void.

So he cannot appoint an attorney, except only to receive seisin of lands, and exception made purely for his benefit.

By stat. 1 Will. IV. c. 65, it is enacted, that an infant copyholder may be admitted in person or by attorney.

It has been already seen (ante, p. 122), that an infant may always bring an action for any injury to his property or person, but that he cannot appoint an attorney to prosecute the suit, nor can he by the practice of the courts appear in person. The court, therefore, by analogy to the provisions of the statute of Westminster 1, (3 Edw. 1 c. 48), appoints a person as *prochein amy* to conduct the action for him (Arch. Prac. by Chitty, p. 889). The application for such appointment may be after or before the suing out of process; and it seems that to grant or refuse it, is in the discretion of the court. (7 M. & W. 405, per Alderson.) How in practice the appointment is made, see Arch. Prac. by Chit. 7 edit. 889, where it will be seen that the usual practice is for the infant either to be brought into court, or to get a petition signed by him. His knowledge or consent, however, is not essential to the appointment (Morgan v. Thorne, 7 M. & W. 400), and the court would vary the practice according to circumstances.

Before the statute of Westminster, the court used to admit a guardian ad litem to sue for him, who is also by the modern practice of the court (whatever formerly might have been the case) (see Fitz. N. B. 27 J.), always appointed by the court; and ever since the practice has been established that the appointment of guardian or *prochein amy* must be by the court, the distinction between the two offices has in fact been taken away, and leaves merely a difference in name.

The power of an infant (Fitz. N. B. 27 J.) to appoint a guardian ad litem, without the authority of the court, is questionable (2 Inst. 261; Simpson v. Jackson, Cro. Jac. 640; Morgan v. Thorne, 7 M. & W. 400 & 403); at any rate, if such an appointment was to be made without the authority of the court, the extent of the power of such guardian would be uncertain and unknown, and should therefore never by resorted to in practice. The appointment of the *prochein amy* or of the guardian to sue being then in all cases the act of the court no appointment or subsequent confirmation by the party is requisite, whether he be an infant of the tenderest age or of years of discretion; nor does it signify at all whether he is

cognizant of the proceedings or not, or whether he is in the country or absent, and he cannot disavow the action. (*Morgan v. Thorpe*, 7 M. & W. 400).

The judgment in the action is binding on the infant, and he cannot, on attaining his majority, commence fresh proceedings on the same cause of action.

It was formerly error if an infant plaintiff appeared by attorney; now, however, by statute 21 Jac. I., c. 13, s. 2, and 4 Anne, c. 16, s. 2, it seems that the appearance of an infant plaintiff by attorney is only a plea in abatement. (*Saund. Rep.* 212.)

The only exception to an infant appearing by attorney, is when he sues in *autre droit*, and this frequently occurs to infant executors when appointed with adults; for although he cannot act till of age, yet the grant of probate is valid, and the infant is a necessary co-plaintiff to the suit. Whether the correct reason of the exception is upon the ground that the adult executor and infant executor being co-plaintiffs, the former can appoint an attorney for both, as was stated in the case of *Foxwist v. Tremaine* (2 *Saund.* 211), or that the exception applies whenever an infant sues in *autre droit*, as appears by *Wade v. Starkey* (*Cro. Eliz.* 542), and *Cotton v. Wescott* (*Cro. Jac.* 441), is perhaps quite immaterial, because a sole infant executor cannot now act or bring any action as executor during his minority. The better argument, however, appears to be, that the exception applies to all suits in *autre droit*, because when acting as executor he is merely acting as agent for another, and carrying out an authority entrusted to him to execute.

An infant cannot sue as an informer on a penal statute, for an informer must exhibit his suit in person, and prosecute it either in person or by attorney. (*Ch. Archbold's Prac.* 889, 7th ed.)

When a minor is made *defendant* in a court of law, and an action may be frequently brought against him, (see ante, vol. xxxi. p. 123, his contracts for necessaries, and post, p. 60, as to his liabilities for torts), he is equally incompetent to appoint an attorney; and in such action it particularly behoves the plaintiff to take care that the appearance is by his

guardian, for should the judgment be against the defendant, he might assign his appearance by attorney for error, and reverse the judgment. *Bird v. Pegg*, 5 B. & A. 418.)

When the infant defendant appears by attorney, the plaintiff should apply to the court to compel an amendment, by entering the appearance by a guardian. (*Hindmarsh v. Chandler*, 7 Taunt. 488.)

Though an infant executor may sue by attorney, yet he cannot defend an action by attorney when sued qua executor with others, and his appearance by attorney would be error. (*Frescobaldi v. Kinaston*, 2 Stra. 783; *Bird v. Orms*, Cro. Jac. 289; 2 Sands. Rep. 212, notes.)

This incapacity of a co-defendant executor to appoint an attorney for him confirms the opinion that his power to appoint an attorney as plaintiff, when suing qua executor, is upon the ground that he is then acting as agent, and not that the validity of the appointment depends upon his co-executor.

As the statute of Westminster (7 Edw. I. c. 48,) applied only to plaintiffs, the infant cannot defend an action by prochein amy, but only by his guardian. Co. Litt. 135 b.)

It remains to state that matters of record, as statutes merchant and of the staple, and recognizances acknowledged by him bind the infant, if not reversed during the minority, because being judicial acts, they cannot be tried by the country, but only by inspection of his person, a trial therefore which must necessarily take place during his minority.

It does not appear, then, to be correct to say that recognizances on fines and recoveries entered into by infants are valid; on the contrary, they appear altogether invalid, but *will become valid* if not set aside during minority, because non-age at the time of executing them cannot be shewn after full age. (2 Inst. 673.)

“Matters of record,” says Lord Coke (Co. Litt. 380 b.) “as statutes merchant and of the staple, recognizances acknowledged by him, or a fine levied by him, recovery against him by default in a real action (saving in dower), must be avoided by him, viz. statutes, &c., by audita quærela, and the fine and recovery by writ of error during his minority, and the like. And the reason thereof is because they are judicial acts, and

taken by a court or a judge ; therefore, the non-age of the party, to avoid the same, shall be tried by inspection of judges, and not by the country. And for that his nonage must be tried by inspection, this cannot be done after his full age ; and so is the law clearly holden at this day, though there be some difference in our books. But if the age be inspected by the judges, and recorded that he is within age, albeit he come of full age before the reversal, yet may it be reversed after his full age."

From this passage it would seem that a judge or magistrate would act incorrectly in taking a recognizance from an infant, and that the infant during infancy could avoid it by audita quærela.

Probably, however, if there was no other reason for setting the recognizance aside except infancy, the court would not discharge him from it, but put him to his suit. (See *ex parte Williams*, M'Clel. 493.)

Having then shown the effect of the infant's contracts, and his power to act, it remains to explain—

HIS LIABILITY FOR TORTS.

The privilege of infancy does not protect them from the consequences of wrongs, and consequently they are liable to civil actions for all torts and injuries of a private nature. (Per Lord Kenyon, 8 T. R. 336.)

Thus an action may be maintained against an infant for slander and libel (*Defries v. Davies*, 1 Bing. N. C. 692 ; S. C. 1 Scott, 594), and it is presumed that his liability for these offences would be similar to his responsibility for criminal acts ; and that although under the age of fourteen years, express malice must be proved, yet above that age malice in law would be sufficient, and his responsibility would after then be the same as an adult. (See *Bacon, Infants*, H.) In all civil actions for torts, wherein malice is the gist of the action, it would appear that the rule would be the same as in criminal cases, and that consequently under the age of seven years no responsibility would attach to his acts, and that after the age of seven years, and between that and fourteen years, the malicious intention of the child must be clearly shown, in order

to obtain judgment against him; but in other civil actions for torts, wherein malice either in law or in fact was not necessary to sustain the action, these distinctions would not arise. Thus detinue or trover will lie to recover any specific chattel which he had no right to retain, and which had not been delivered to him upon any contract, without reference to his age at the time the detention was committed. (*Mills v. Graham*, 1 N. R. 140.) So trover or trespass would lie for an unlawful taking by the infant, as for property embezzled by him, although his age might be such as not to render him criminally responsible; and since the form of the action in no way alters his liability, assumpsit for money had and received would lie, if he had subsequently to such wrongful conversion sold the goods for his own use, and obtained money for them. (*Bristow v. Eastman*, 1 Esp. 172.)

Trover or detinue would also lie against an infant for not returning goods sent to him for a particular purpose which has been fulfilled, or for a limited time which has expired. His liability arises in such case independently of the original contract of bailment; thus if goods are lent to an infant for a specific time, trover would lie if he failed to return them (*Mills v. Graham*); or if goods are sent to an infant to be manufactured, and he refuses to return them after they are completed, detinue or trover would be the proper remedy. (*Co. Litt.* 180 b, note 4.) An infant is also liable in trespass *quare clausum fregit*, or *vi et armis*, and the only difference between him and an adult is, that the infant is not liable as a trespasser by a prior or subsequent assent. If the infant has committed a wrong, it has been already shewn that it is immaterial whether the action be brought in form *ex contractu* or in tort; for his liability for the wrong does not depend on the form of the action. (*Bristow v. Eastman*, Peake, 223.)

So by charging an infant in an action of tort, where the foundation of the action is upon a contract, he will not thereby be rendered liable for a breach of contract. (*Jennings v. Randall*, 8 T. R. 335.) Thus where an infant hires a horse he will not be liable in an action on the case for an immoderate use of it, the offence arising clearly out of the mere breach of

the agreement; but had he refused to return it, or had wilfully killed the horse, for such wrongs it would seem that his nonage would not protect him. (*Howlett v. Howlett*, 4 Camp. 118.)

On the same principle it was held (*Green v. Greenbank*, 2 Marsh. 485), that infancy is a bar to an action for a breach of a warranty of a horse, though framed in an action on the case for deceit, the foundation of the action being a breach of the undertaking, whether the action is framed in assumpsit, or case for the deceit.

It has already been said (*ante*, vol. xxxi., p. 135; *Johnson v. Pie*, 1 Lev. 169; 1 Keb. 905, S. C.), that an infant who has goods delivered to him on a contract of sale is not liable either in trover or detinue, inasmuch as the delivery was in pursuance of a contract, by which the return of the goods was not contemplated, a circumstance which distinguishes these cases from the case of *Mills v. Graham* (1 N. R. 140), above quoted.

The writer of this article has known instances in which an action of debt and detinue has been brought against an infant upon his refusal to pay for or return goods sold to him, and a plea of infancy to the count in detinue was not pleaded, on the authority of Mr. Chitty, who in his work on pleading, vol. 1, p. 124, 6th ed., says, "that if an infant buys goods and refuses to pay for them, detinue lies for the goods." The resolution of the Court of B. R. in the time of Charles II., as reported in vol. 1 of *Siderfin*, p. 129, contradicts this opinion, and is in these words: "que si un deliver biens al infant pur contract, se sachant luy destre infant, le infant ne serra chargé in trover et conversion pur ceux, car par cel noy toutes les infants in Engleterre serront runi;" and therefore it seems properly said in *Bacon's Abridgment* (*Infants I.*) that the effect of the delivery of the goods to the infant is a *gift*. Immediately below the above quotation from *Siderfin* there is a query; whether the infant would be liable in trover, if the party delivering the goods to him did not know him to be an infant; and at the present day it would probably be held that if the infant was guilty of any deceit in concealing his age, the action of trover would be retainable, or an action on the case for the deceit. (See 1 *Levinz*, 169.)—*Law Magazine*.

ON THE PROOF OF HANDWRITING.

Few rules in the law of evidence are more interesting in theory or more useful in practice, than those which relate to the proof of handwriting; yet it is an undoubted fact, that on no subject are the opinions expressed even by sound lawyers less satisfactory or consistent. It will be our endeavour, therefore, in the present article, to discuss this branch of the law, in the hope that our observations may prove of some service to those who are actively engaged in the conduct of causes at Nisi Prius.

When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the writer himself, if he be a competent witness, or some person who actually saw the paper or signature written. When such evidence cannot be procured, as must often be the case, recourse may be had to the testimony of witnesses who are acquainted with the handwriting. Such evidence, indeed, may in all cases be given in the first instance, as the law recognizes no distinction between these several modes of proof; but, as it is clearly less satisfactory than direct testimony, any unnecessary reliance on it will raise a suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

The knowledge of a person's handwriting may have been acquired in both or either of two ways (*a*). The first is, from having seen him write; and though the weight of the evidence which depends upon knowledge so obtained, must, of course, vary in degree, according to the number of times that the party has been seen to write, the circumstances, whether of hurry or deliberation, under which he wrote, the interval that has elapsed since the last time, and the opportunities and motives which the witness had for observing the handwriting with attention; (*b*) yet the evidence will be admissible, though

(*a*) See 3 Benth. Jud. Ev. 598, 599.

(*b*) Doe v. Suckermore, 5 A. & E. 730 ; per Patteson J.

the witness has not seen the party write for twenty years (*a*) or has seen him write but once, and then only his surname (*b*).

Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents. (*c*) The proof, in such cases, may be very slight, but the jury will be allowed to weigh it. The witness need not state, in the first instance, how he knows the handwriting, since it is the duty of the opposite party to explore, on cross-examination, the sources of his knowledge, if he is dissatisfied with the testimony as it stands. (*d*) Still the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded; though, if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be rejected. (*e*) Where a witness, called to establish a forgery, had become acquainted with the signature of the party from having seen him sign his name, after the commencement of the suit, for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon justly observing that the party might, through design, have written differently from his common mode of signature. (*f*)

The second way in which the knowledge of a person's handwriting may be acquired, is by the witness having seen in the ordinary course of business, documents, which by some evidence, direct or circumstantial, are proved to have been written by such person. Thus, if the witness has received

(*a*) *R. v. Horne Tooke*, 25 How. St. Tr. 71, 72; *Eagleton v. Kingston*, 8 Ves. 473, 474; per Lord Eldon.

(*b*) 5 A. & E. 730. Per Patteson, J.; *Garrells v. Alexander*, 4 Esp. 37, per Lord Kenyon; *William v. Worrell*, 8 C. & P. 380; *Burr v. Harper*, Holt's N. P. R. 420; *Lewis v. Sapio*, M. & M. 39, per Lord Tenterden, who refused to recognize the authority of *Powell v. Ford*, 2 Stark. R. 164, where Lord Ellenborough rejected the testimony of a witness, who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See also *Warren v. Anderson*, 8 Scott, 384.

(*c*) *George v. Surrey*, M. & M. 519, per Tindal, C.J., after some hesitation.

(*d*) *Moody v. Rowell*, 17 Pic. 417, over-ruling *Slaymaker v. Wilson*, 1 Pennsylv. R. 216.

(*e*) *R. v. Murphy*, 8 C. & P. 306, 307, per Coleridge, J.; *Da Costa v. Pym*, Pea. Add. R. 144, per Lord Kenyon.

(*f*) *Stanger v. Searle*, 1 Esp. 15. See *Page v. Homans*, 2 Sheph. 497.

letters purporting to be in the handwriting of the party, and and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the part as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible.(a) So, if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is, that the answer was written by the person addressed in the letter; and consequently, the witness who received such answer, may be examined as to the genuineness of any other paper, which it is necessary to show was or was not written by the same person.(b) Again, the clerk who constantly read the letters, or the broker who was consulted upon them, is as competent as the merchant to whom they were addressed to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him.(c) In one case, an attorney was permitted to speak to the signature of an attesting witness, though his knowledge of the handwriting was solely derived from having seen the same signature attached to an affidavit, which had been filed by the opposite party in a previous state of the cause.(d) Here the opposite party having used the affidavit as a genuine document, was in a manner estopped from disputing the fact that it was signed by the person whose signature it bore. But perhaps, after all, some doubt may be entertained respecting the correctness of this decision; since, in another case, the plaintiff's attorney was not allowed to prove the defendant's handwriting, though he had frequently seen and acted upon

(a) *Doe v. Suckermore*, 5 A. & E. 731, per Patteson, J.; 2 Nev. & P. 46, S. C.; *Lord Ferrers v. Shirley*, Fitz. 195, B. N. P. 236; *Carey v. Pitt*, Pea. Add. R. 130; *Tharpe v. Gisburne*, 2 C. & P. 21; *Harrington v. Fry*, Ry. & M. 90; *Burr v. Harper*, Holt's N. P. R. 420; *Comm v. Carey*, 2 Pick. 47; *Johnson v. Daverne*, 19 Johns, 134; *Pope v. Askew*, 1 Tredell, R. 16.

(b) *Carey v. Pitt*, Pea. Add. R. 130, per Lord Kenyon.

(c) *Doe v. Suckermore*, 5 A. & E. 740, per Lord Denman.

(d) *Smith v. Sainsbury*, 5 C. & P. 196, per Park J., cited by Lord Denman in *Doe v. Suckermore*, 5 A. & E. 740.

other papers in the master's office, which the opposite attorney admitted had been written by the defendant.(a) Where in an action on a joint and several promissory note against three persons, the signature of one of them was attempted to be proved by calling the attorney for the defendants, whose knowledge of his handwriting was founded on the circumstance, that he had required a retainer signed by his three clients, and had in fact received one purporting to be signed, and had acted upon it in defending the action, the Court of Common Pleas held that his testimony was inadmissible, inasmuch as there was no proof that the party had ever acknowledged the signature to the attorney, and either of the other two defendants might have signed the retainer for him with his assent.(b) So the testimony of an inspector of franks, called to prove the handwriting of a member of parliament, has more than once been rejected, where the knowledge of the witness has been simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he has never communicated with the member on the subject of the franks; for, in this case, there is no evidence to prove that the superscriptions of the letters he had seen were not forgeries.(c) These last decisions certainly carry the law to the very verge of impropriety, since they are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sensible rule, that a crime is not to be presumed, or so much as suspected, without special ground, in any single instance; much less in a number of unconnected instances.(d)

In whichever of these two ways the witness has acquired his knowledge of handwriting, it is obvious that evidence, identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either *aliunde*, or by the testimony of the witness himself, if he is personally acquainted with the writer.(e) If this were

(a) Greaves v. Hunter, 2 C. & P. 477, per Abbott, C. J.

(b) Drew v. Prior, 5 M. & Gr. 264.

(c) Carey v. Pitt, Pea. Add. R. 130, per Lord Kenyon; Bachelor v. Honeywood, 2 Esp. 714, per id.

(d) 3 Benth. Jud. Ev. 604.

(e) See Doe v. Suckermore, 5 A. & E. 731, per Patteson J.

not so, the witness might be proving the handwriting of one man, while the party calling him might be seeking to establish the signature of another.

When witnesses are called to speak to handwriting, they should declare their *belief* on the subject, though, in one case, it has been held by Lord Kenyon, that the evidence of a witness who admitted his inability to form a belief, but who stated that the paper produced was *like* the handwriting of the individual by whom it purported to have been written, was admissible. (a) This case, though recognized by Lord Wynford, (b) has been questioned by Lord Eldon, (c) and apparently with reason. It may be very true, as Lord Eldon admits, that witnesses are occasionally pressed too much to form a belief; (d) and some allowance should certainly be made for the over caution of a scrupulous witness; but though it may be very proper to admit the testimony of a person, who, declining to express a decided belief, will yet declare that he is of *opinion* or that he *thinks* the paper is genuine. yet it is going a step further when the witness will only state that the handwriting is like;—a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison,—it being the belief which a witness entertains, when comparing the writing in question with an exemplar in his mind, derived from some previous knowledge, (e)—yet the law will not allow the witness, or even the jury, except under circumstances that will be presently mentioned, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. Several reasons have been assigned for this rule. One is, that the jury may be too illiterate to form an opinion upon this sort of evidence. “Suppose,” said Mr. Justice Yates,

(a) Garrells v. Alexander, 4 Esp. 37.

(b) 2 Ph. Ev. 249, n. 2.

(c) Eagleton v. Kingston, 8 Ves. 476. See also Cruise v. Clancey, 6 Ir. Eq. R. 552.

(d) Eagleton v. Kingston, 8 Ves. 476.

(e) Doe v. Suckermore, 5 A. & E. 730, per Patteson, J.

“ some of the jury cannot read : how can they judge of the “ similitude ? ” (a) Surely this argument requires no answer at the present day, and never could have applied to the case of a witness being called upon to make the comparison ; since a party would scarcely select for this duty a person, whose ignorance, instead of throwing light, would heap ridicule on his cause. (b) The second reason is, that specimens may be craftily selected, being such as are calculated rather to serve the purpose of the party using them, than to exhibit a fair example of the general character, of the hand writing ; (c) but to this it may be answered, first, that, if the specimens were authentic autographs, they would at least furnish *some*, though not the most satisfactory data, by which a comparison might be formed with the writing in dispute, since a certain similarity may be ever traced between the most dissimilar writings of the same person ; (d) and secondly, that the unfairness of the selection would be open to inquiry, and if exposed, as it might easily be on cross-examination, would draw down on the party making the attempt the usual consequences of detected fraud. (e) If, indeed, the *genuineness* of the specimens be disputed, another and more serious objection to the mode of proof by comparison arises ; for, in such an event, collateral issues might be raised upon every paper used as a standard ; and it is further urged, that, as these papers might be also proved by mere comparison, the inquiry might lead to an endless series of issues, each more unsatisfactory than the preceding. (f) The last branch of this argument is evidently founded on fallacy ; since it is obvious that one specimen at least *must* be proved in some other way than by comparison ; and such being the case, no man in his senses would run the risk of complicating, if not of defeating his proof, by tendering papers to be compared with this autograph, in order that

(a) *Brookbard v. Woodley*, Pea. R. 21. n. (a) ; *Macferson v. Thoytes*, id. 20. per Lord Kenyon ; *Eagleton v. Kingston*, 8 Ves. 475, per Lord Eldon ; *Burr. v. Harper*, Holt. N. P. R. 421, per Dallas J. ; *Doe v. Suckermore*, 5 & A. E. 723, per Williams, J., and 749, per Lord Denman.

(b) See per Lord Denman, in *Doe v. Suckermore*, 5 A. & E. 749.

(c) *Burr. v. Harper*, Holt's N. P. R. 421, per Dallas J.

(d) See per Williams, J., in *Doe v. Suckermore*, 5 A. & E. 726.

(e) See per Lord Denman, in *Doe v. Suckermore*, 5 A. & E. 751.

(f) *Doe v. Suckermore*, 5 A. & E. 706, 707, per Coleridge, J. ; 2 St. Ev. 516.

such papers might in their turn form a standard, wherewith to compare the disputed document. Prudence, to say nothing of justice, would surely suggest the wisdom of producing the autograph alone. Indeed, the whole argument is much more specious than sound, as it would be never necessary, and seldom expedient, to prove more than one disputed specimen, and there could be no more danger or difficulty in allowing the judge to decide whether this proof had been satisfactorily established, than is now felt in those cases where the court has to pronounce an opinion on the admissibility of confessions or dying declarations, or has to determine whether a deed has been duly executed or stamped, or whether sufficient search has been made for it, or whether it comes out of the proper custody. In all these and the like cases, the judge, as is well known, is called upon to decide questions of fact.

It may here be worth while to cite the remarks of Sir W. D. Evans, who is certainly no mean authority on this, or on any other legal questions. "Where, in point of reason," says that profound writer, "is the objection to proof by comparison of hands, as founded upon an inspection at the trial?" "What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind,—with the image and copy of the supposed reality? And when the comparison is made, not with this imperfect and fallacious copy, but with an undisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may be naturally expected to afford." (a) Even Mr. Starkie, who appears, on the whole, to be in favour of the rule as it exists, is forced to admit, "that abstractedly a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps,

(a) 2 Evan's Poth. Law of Obl. 185, App. No. 16, s. 6.

“under circumstances which did not awaken his attention.” (a) It has been urged that this is an unfair mode of stating the argument, since the weakest possible degree of knowledge which can arise from seeing a person write, is contrasted with the strongest possible degree which can arise from a direct comparison; (b) but, admitting this to be the case, we are prepared to go much farther than Mr. Starkie, and to contend that in almost every case a jury would be more likely to come to a correct conclusion, were they allowed to compare, in their own way, the paper in dispute with a proved or acknowledged autograph, (c) than they now are, when called upon to pronounce a verdict on the evidence of a witness, who of course comes prepared to give favorable testimony on behalf of the party who calls him, who runs little risk of incurring the penalties of perjury, since he is only required to state his *belief*, and who moreover has seldom had an opportunity of acquiring any great familiarity with the character of the handwriting on which he undertakes to pass an opinion. To illustrate the argument by referring to “twins, who may present no observable diversity to a *stranger*, and yet be distinguished at a glance by their *parents*,” (d) is to advance a position at least as unfair as that stated by Mr. Starkie; for it assumes that all witnesses have acquired a most intimate knowledge of the handwriting which they are called upon to prove. Yet does the law demand the production of such witnesses, or are they in fact produced? Most assuredly not. Besides, the argument at best amounts to this that persons well acquainted with the character of handwriting, are more competent than utter strangers to judge whether a document bears that character; a proposition which, however true, does not touch the question, whether it be more expedient to have recourse to indirect, than to direct, comparison. The fact, if it be one, that persons are apt to form fanciful conclusions from compari-

(a) 2 St. Ev. 516.

(b) Doe v. Suckermore, 5 A. & E. 734, 735, per Patteson, J.

(c) In order to prevent the opposite party from being taken by surprise, a provision might be made, that papers should not be laid before the jury for the purpose of comparison, unless such papers had, previously to the trial, been submitted to the inspection of the adversary, and notice had been given of the course about to be pursued.

(d) Doe v. Suckermore, 5 A. & E. 745, per Lord Denman.

son of handwriting, some dwelling on the general character, some on the peculiar turns of a particular letter, and others on more minute circumstances of similitude or discrepancy, which may be wholly accidental, has been strangely twisted by one learned judge into an argument in favor of the present rule(a); but no fallacy can be more apparent than this; for, admitting that the fact is so, the only deductions derivable from it are, first that the power of proving handwriting by comparison cannot be safely entrusted to a *witness*, or even to a single judge; secondly, that a jury should not be enabled to institute such a comparison for the purpose of *disproving* handwriting; and lastly, that it may be impolitic for a party to rely on this mode of proof, in consequence of the difficulty of securing the suffrages of twelve men on a subject respecting which opinions confessedly differ so largely.

The principle of direct comparison, which we here advocate, has been long recognized and acted upon by the common law courts with respect to other matters. Thus, if a prisoner be charged with stealing wheat, and the question turn on the indentivity of that found in his possession with the corn belonging to the prosecutor, it is every day's practice to produce parcels from each lot, and to call upon the jury to compare them together, with or without the aid of witnesses; and no one dreams of contending that such a comparison is not more satisfactory, than if the farmer, who grew the wheat, and is therefore well acquainted with its character, were asked to speak to the indentivity of the lot found on the prisoner, by vaguely comparing it with the exemplar of his own corn which memory had formed in his mind. Then, if this be the case,—and that it is so with respect to numerous questions of identity, is a proposition which admits of no doubt,—why is not the same principle to prevail, when the issue turns on the genuineness of handwriting? The same collateral issues may arise in all these cases, but while danger is *apprehended* from this cause in matters of handwriting, none whatever is *experienced* in all other inquiries of a kindred nature. The

(a) Doe v. Suckermore, 5 A. & E. 735, per Patteson J.

analogy, on principle, is complete; and no satisfactory reason can be given, why the practice should be different.

In the ecclesiastical courts, witnesses skilled in the examination of handwriting and detection of forgeries have been permitted for centuries to depose to their opinion, upon direct comparison of the writing in question with other documents admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; and that, too, though the specimens on which the comparison is founded may be wholly irrelevant to the cause. (a) In France the same doctrine prevails, at least to a limited extent (b) and in America though some of the statutes have adopted the English rule, others have altogether rejected it; while a few have received it subject to considerable modifications. (c) It will be seen, by referring to the last note, that the American decisions do not add much weight to either side of the argument; and they are here noticed, rather as furnishing to the curious reader ample sources for further investigation, than as affording a safe, or indeed an intelligible, guide on which to rely. If it were possible to extract from these conflicting judgments a rule which would find support from the majority of them, perhaps it would amount to this: that such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them; that is, where the papers are

(a) 1 Will. on Ex. and Ad. 260; 1 Oughton, Ord. Jud. tit. 225. ss. 1—4; Doe v. Suckermore, 5 A. & E. 708—710, per Coleridge J.; Beaumont v. Perkins, 1 Phillim. 78; Saph v. Atkinson, 1 Add. 215, 216; Machin v. Grindon, 2 Cas. temp. Lee, 335; 2 Add. 91. n. (a) S. C.

(b) Code de Proc. Civ. part. i. li. 2 tit. 10 s. 193—216; Pothier v. Œuvr. Posth. 46; Doe v. Suckermore, 5 A. & E. 710, 711, per Coleridge J.

(c) In New-York, Virginia and North Carolina, the English rule is adopted, and such testimony is rejected. Jackson v. Phillips, 9 Cowen, 94, 112; Titford v. Knott, 2 Johns. Cas. 210; Rowt v. Kile, 1 Leigh R. 216; The State v. Allen, 1 Hawks. 6; Pope v. Askew, 1 Tredell, R. 16. In Massachusetts, Maine and Connecticut, it seems to have become the settled practice to admit any papers to the Jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting. Homer v. Wallis, 11 Mass. 309; Moody v. Rowell, 17 Pick. 490; Richardson v. Newcomb, 21 Pick. 315; Hammonds case, 2 Greenl. 33; Lyon v. Lyman, 9 Conn. 55. In New Hampshire and South Carolina, the admissibility of such papers had been limited to cases where other proof of handwriting is already in the cause, and for the purpose of turning the scale in doubtful cases. Myers v. Toscan, 3 N. Hamp. 47; The State v. Carr, 5 N. Hamp. 367; Bowman v. Plunkett, 3 M'C. 518; Duncan v. Beard, 2 Nott. & M'C. 401. In Pennsylvania, the admission has been limited to papers conceded to be genuine. M'Corkle v. Binns, 5 Binn. 340; Lancaster v. Whitehill, 10 S. & R. 110; or concerning which there is no doubt. Baker v. Haines, 6 Whart. 284.

either conceded to be genuine, or are such as the other party is precluded from denying; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony. (a)—(*To be continued.*)

NOTES OF LEADING CASES.

PLEADING.

INTEREST—WHEN RECOVERABLE AS PART OF DEBT, AND WHEN AS DAMAGES ONLY.

HUDSON v. FAWCETT, 8 SCOTT, N. R. 32.

The question as to when interest is recoverable as a part of the debt itself, and when as damages only, is one of great practical importance in a pleading point of view, as upon this the pleader is entirely guided with reference to the amount of damages he lays in the declaration. For when the interest is regarded as a part of the debt, and is recoverable as such, the damages laid need only be nominal; whereas, when the interest cannot be properly included *as a part of the debt* demanded, but must be recovered as damages for the detention of the debt, then a sum sufficiently large to cover the full amount of interest, which has accrued upon such debt, should be laid as damages at the end of the declaration.

The importance of this rule was well instanced in the case of *Watkins v. Morgan*, 6 Car. & P. 661; 1 Ch. Pl. 128. A. covenanted to pay B. 270*l.* on the 15th of December, *with interest up to that time*. A. omitted to do so, and B. brought an action of debt, laying his damages at 10*l.*: and it was held that B. could not recover any more than the principal sum of 270*l.*, *the interest up to the 15th of Dec.*, and 10*l.* more for the interest which had accrued subsequently to that date; although the interest up to the time of the commencement of the action amounted in fact to a much larger sum than 10*l.* In this case, the interest which A. covenanted to pay B. on the 15th of December was regarded as a part of the debt, and

(a) *Smith v. Fenner*, 1 Gall. 170, 175. See also *Goldsmith v. Bane*, 2 Halst. 87; *Bank of Pennsylvania v. Haldemand*, 1 Pennsylv. R. 161; *Sharp v. Sharp*, 2 Leigh, 249.

was recoverable as such ; while that which accrued subsequently to that period, and before the commencement of the action, not being made the subject of an express covenant, and therefore incapable of being reduced by means of calculation to a sum certain, was simply regarded as damages for the detention of the principal beyond the time mentioned in the deed, and could be recovered only as such.

The doctrine laid down in the *nisi prius* case just referred to, has recently received the sanction of the judges of the Court of Common Pleas in the case of *Hudson v. Fawcett* above selected for consideration. It was an action of debt by the payee against the maker of a promissory note for 40*l.*, dated the 29th of March, 1840, and payable on demand, "with lawful interest for the same." The declaration, in addition to the count upon the note, contained also a count in 50*l.* for money lent, and the same sum upon an account stated. The defendant pleaded—first, *as to the said debts* in the declaration mentioned, except so far as the same relate to the sum of 5*l.*, parcel, of the said sum of money in the first count of the declaration mentioned, that on divers days after the accruing of the said debts, and before the commencement of this suit, he the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, divers sums of money, amounting, to wit, to the sum of 150*l.*, *in full satisfaction and discharge of the said debts*, except as aforesaid, and *of all damages* by the plaintiff sustained by reason of the detention of the said debts, except as aforesaid, concluding with a verification. Secondly, a set-off of 150*l.* for money lent, money paid, and money due upon an account stated. Thirdly, payment of 5*l.* into court.

The plaintiff traversed the first two pleas and took the 5*l.* out of court. Upon the trial a verdict was found for the defendant, with liberty to the plaintiff to move to enter a verdict for him for 2*s.* 6*d.*, if the court should be of opinion that upon these pleadings the *interest* was recoverable. A rule *nisi* was obtained accordingly, and *Byles*, Serjeant, in showing cause, contended, that as the first plea was pleaded, not to the whole cause of action, except as to 5*l.*, but to the *debts* only, and as the interest sought) to be recovered in the first count

was not included in the word "debts," and as the plea can be an answer to so much only as it professes in the commencement to answer, that therefore that part of the cause of action which consisted of the interest was left altogether unanswered and that the plaintiff's course, instead of going to trial upon the issue so raised, should have been to demur, or to have signed judgment by nil dicet for the part unanswered, but that the discontinuance was cured after verdict. The court, however, was of opinion that the before cited case of *Watkins v. Morgan* was a conclusive authority in favor of the plaintiff, and that as the interest formed part of the debt, it was therefore recoverable upon the issue raised by the pleadings, and that the plaintiff was entitled to his rule.

The result of this case, in connection with that of *Watkins v. Morgan*, may be stated as follows:—That when, in an action of debt, the instrument declared upon, expressly provides for the payment of interest in such a way as to render it capable of being reduced by means of calculation to a sum certain, then such interest is regarded as a portion of the debt itself, and may be recovered as such; but that where interest is sought to be recovered on a principal sum, not by virtue of any express terms or provision contained in the instrument by which that sum is secured, then such interest is regarded simply in the light of *damages* for the detention of the principal sum, and is recoverable as such. Hence, even in the action of debt, where a part of the cause of action consists of interest not expressly reserved or made payable, it is essential to lay such damages at the end of the declaration as will be sufficient to cover the interest sought to be recovered.

The case of *Hudson v. Fawcett* may be conveniently noted in 1 Chit. Pl. 389; 2 ib. 313, 314, last ed.—*Law Magazine*.

BANKRUPTCY.

FRAUDULENT PREFERENCE.

MARSHALL v LAMB, 5 Q. B. 115.

The doctrine of fraudulent preference which was engrafted upon the bankrupt laws by judicial decisions, and more especially by those of Lord Mansfield, has been the subject of so

much diversity of opinion that no one will dispute what was said by Lord Denman in delivering the judgment of the court in *Aldred v. Constable* (4 Q. B. 674), that the cases reported with reference to it cannot be reconciled. It has long been settled that the creditor need not in any way be a participator to the intended fraud upon the bankrupt laws, but that the question is to be determined by the conduct and circumstances of the bankrupt. It seems now also to be settled, that while on the other hand, insolvency is not absolute proof of the contemplation of bankruptcy, yet, on the other hand, no specific act of bankruptcy need be contemplated at the time of the preference. It suffices if the debtor "considered that he was "likely, from the condition in which he stood, to become a "bankrupt;" and as there is no infallible proof of what passes in a man's mind, we may say that "if his circumstances are "such that any prudent man, taking a reasonable view of his "situation, and the surrounding circumstances at the time, "might fairly expect bankruptcy would follow," a jury would be right in declaring bankruptcy to have been contemplated and the preference fraudulent. (*Abbot v. Burbage*, 2 B. N. C. 444; *Gibson v. Muskett*, 3 M. & G. 158; 4 M. & G. 160; *Aldred v. Constable*, 4 Q. B. 674). Other questions, however, have arisen as to the purport of the word "preference." Is it used relatively to the creditor, so that he must benefit by the act? or is it used only in relation to the estate of the bankrupt? And will an act which interferes with the equal distribution of the bankrupt's estate be fraudulent, notwithstanding that the debtor should not intend to prefer that particular creditor, or that he shall not in fact benefit from the preference shown? The case of *Abbot v. Pomfret* (1 B. N. 3. 462), and *Belcher v. Jones* (2 M. & W. 258), decided that the intention to benefit the person who in fact gained a preference was essential. In the last case, where, in consequence of an intimation *intended* by the bankrupt only to cause a private creditor to obtain payment of his debt, that creditor drew out of the bank not only the amount of his own balance, but the balance of a company of which he was a director, the Court of Exchequer held that there was no fraudulent preference of the company. The inference from these cases

seemed to allow, that the effect of the act upon the estate of the bankrupt was not so much contemplated as his intention, and the fulfilment of it by a benefit being gained by the creditor. In *Marshall v. Lamb* (5 Q. B. 115) it was for the first time necessary to decide whether a person, who in fact received no benefit from the act of the bankrupt, should be considered as a creditor fraudulently preferred, because the bankrupt had for his own advantage caused a sum to be withdrawn from his general assets. The facts were peculiar, but the principle involved is of great importance. It appeared that the defendant had advanced money to the bankrupt on a mortgage (dated June 12, 1840), of which the interest and dividends (and the capital in a particular event) of 2000*l.* of 3 per cent. reduced bank annuities, which by settlement, at the time of the bankrupt's marriage, had been conveyed to trustees to pay the dividends for the separate use of his wife during their joint lives, and after her decease, to permit the bankrupt, if surviving, to receive them during his life, and on further trusts which it is unnecessary to state. The wife, in execution of a power reserved to her by the settlement, joined in the mortgage. It included also a policy of insurance on the bankrupt's life, and some leasehold property of his sister, who was a party to the mortgage. There was a covenant for re-assignment, if the principal, with 5 per cent. interest, should be repaid on the 12th December then next: also a covenant by the bankrupt to repay the said principal and interest on that day: and further, if the said principal and interest should not then be paid, the bankrupt would pay half-yearly interest on the said principal sum of 700*l.*, or so much thereof as should remain due. A power of sale was given to the defendant, if default should be made in principal and interest contrary to the provision in that respect, and also for two calendar months after notice to pay; and there was a covenant that the mortgagor should possess and enjoy, &c., until default made in principal or interest.

It was proved that the bankrupt had, unasked and in contemplation of bankruptcy, and after an act of bankruptcy, pay off this mortgage with four months' additional interest, because no notice had been given. The assignees sued

the defendant for the amount. It was admitted that the only party benefitted was the bankrupt and his family, and that the creditor gained no advantage whatever from the transaction; but the payment having been made out of the estate, it was contended that there was a fraudulent preference, that is, that the word "preference" is to be taken relatively to the estate and other creditors, and *not* to the particular party receiving the money.

It was distinguished from the case of a mortgage or lien upon the bankrupt's own property, because then the property given up would have been received by the assignees, but here they gained nothing, and the estate lost 700*l*. The court admitted that the case was one of great difficulty, but held it to be a fraudulent preference, supporting the direction of Mr. Justice Maule at the trial. "The defendant," said Lord Denman, in delivering the judgment of the court, "was a creditor of the bankrupt, because the money "was lent to him and he covenanted to repay it; the payment was therefore emphatically a payment of the bankrupt's debt, in order to release the property of his friends, "which they had mortgaged for his benefit; the defendant "did therefore receive twenty shillings in the pound out of "the bankrupt's estate to the prejudice of other creditors, "although it was no benefit to him, for he would have been "as well off if he had kept the mortgage deed."

This establishes, therefore, that neither the intention to confer a benefit, nor the actual benefit of the creditor, are essential requisities to constitute a fraudulent preference; the "preference" is shown by the loss to the estate, not the advantage of any other party.

It should be remarked further, that in *Ex parte Simpson* (14 L. J. 1, Bank.), the question whether payment of money by way of fraudulent preference was an act of bankruptcy within the third section of 6 Geo. IV. c. 16, was elaborately argued in the Court of Review. Sir J. L. Knight Bruce held that he could not agree with the expressed opinion of Lord Chief Justice Tindal in *Bevan v. Nunn* (9 Bing. 112, to which he still adhered); and that it was an act of bankruptcy within that section. If this be the correct view, it would of course render it unnecessary to determine whether a payment of money is "a dealing or transaction" within 2 & 3 Vict. c. 29, for the statute does not protect any transactions which are *per se* acts of bankruptcy. (*Hall v. Wallace*, 7 M. & W. 353; *Turquand v. Vanderplank*, 10 M. & W. 180).

Marshall v. Lamb may be noted in *Montagu & Ayrton's Bankruptcy*, vol. i. p. 805.—*Law Magazine*.

THE UPPER CANADA JURIST.

IN CHANCERY.

(IN REVIEW).

SATURDAY, 6TH SEPTEMBER, 1845.

IN RE DAVID KISSOCK, A BANKRUPT.

K. having become a bankrupt, and passed the several examinations required by the statute 7 Vic., ch. 10, before E. C. Campbell, Esquire, Judge of the Niagara District Court, and obtained from the Commissioner his certificate, a petition was presented to the Vice-Chancellor by several of his creditors, praying a stay of the certificate, on grounds of fraud, &c. Held, that the Commissioner of Bankrupts is the only person who can exercise any discretion in granting or refusing the certificate to the bankrupt, under the provision of the Statute.

This was a motion to stay the certificate from issuing for David Kissock, of St. Catharines, on the grounds of fraud in having obtained credit, and that the statement made before the commissioner was not satisfactory. The petition was to the following effect :

“ In the matter of David Kissock, a Bankrupt.

“ To the Hon. Robert S. Jameson, Vice-Chancellor of Upper
“ Canada.

“ The humble Petition of,” &c.

Stated: That a commission had been issued against David Kissock, by Edward Clarke Campbell, Esq., and proceedings had thereon; and that a certificate of the said bankrupt's conformity had been signed by the said E. C. Campbell, and was then lying in this honourable court for confirmation and allowance.

That the petitioners were creditors of the said bankrupt and had come in under the commission, and proved their debts.

That the said bankrupt had made divers fraudulent misrepresentations to his creditors as to the state of his affairs, and concealed some part of his property, and therefore the said certificate should be declared void. And prayed the certificate might be stayed, and such other order made, &c.

Signed by the petitioners.

“Witness, J. F. Maddock, Solicitor for the Petitioners.”

From the affidavits filed, it appeared that a few months before going into the Bankrupt Court, Kissock had exhibited a statement of his assets, shewing a balance in his favor of 2000*l.*, and of which no satisfactory account had been given, and also that the bankrupt had not kept any books whereby his affairs could be investigated; on both grounds the counsel for the petitioners relied for an order for this court to stay the certificate as prayed.

[A preliminary objection was taken by the counsel for the bankrupt, that the petition and affidavits were not entitled in the Court of Review, also that the attestation to the petition by the solicitor was not sufficient, which should have been “J. F. M., solicitor to the petitioners in the matter of the petition,” (a) but was over-ruled; it appearing that a solicitor of the court had attested the petition, who would be answerable for costs if improperly presented, and the court considering the entitling of the petition, &c. sufficient.]

Sullivan for petitioners.—The fact of no books having been kept by the bankrupt was sufficient to create in the mind of any one a strong suspicion of fraud; and from the small extent and nature of the business in which the bankrupt had been engaged, it was impossible that in the course of a few months so large a sum as 2000*l.* could have been lost without the bankrupt having been able to give some satisfactory account thereof; either that sum or a great portion of it had been concealed by the bankrupt, or else the representations made by him to his creditors at the time of contracting the debts with them were untrue; in either case it was such an act of fraud as would justify this court in withholding the certificate.

(a) 3 Deacon, 310.

Mowat for the bankrupt.—The proper time for the petitioners to have taken these objections was before the commissioner, but although they had there appeared by counsel during the examination of the bankrupt, none such were urged, they having declined examining the bankrupt, relying on a subsequent appeal to this court; having omitted at that time to take these objections, the petitioners are now too late, and the certificate cannot be withheld.

THE VICE CHANCELLOR.—To impeach a certificate, the certificate itself must have been obtained by fraud; and it is not sufficient to state mere suspicion of fraud, which may be incapable of proof. Nor can this court interfere in any way by withholding the certificate, merely because the statement made by the bankrupt is not as full and satisfactory as it ought to be. The commissioner is the only party to whom is given any discretion in the matter, and he having granted the certificate required by the act to be given by him, I cannot set up my opinion against his as to the propriety of having done so.

Had the commissioner refused to receive evidence of the charges of fraud, this court might interfere on that ground, but no such fact is alleged, and I believe the case is free from that objection. And although the statement of the bankrupt is certainly one with which I would not, as a creditor, have felt at all satisfied, still the commissioner, with all the facts before him, appears to have considered it sufficient, and has accordingly granted the certificate.

I may also add, that the charges of fraud in affidavits to stay a certificate, should be a positive allegation of facts from which the fraud is to be inferred, and not *to the best of knowledge, &c.*, that the party has committed a fraud, as in the affidavits filed by the petitioners.

The bankrupt must therefore obtain the usual certificate, and the motion to stay it, I refuse with costs.

IN CHANCERY.

FRIDAY, 14TH NOVEMBER, 1845.

WINSTANLEY V. KING'S COLLEGE.

The defendants having filed a demurrer to part of the bill and the time for setting the same down for argument by the plaintiff having been allowed to expire, the defendant gave notice of motion for an order to declare the said demurrer allowed, and for the costs thereof. Held that an order for that purpose is necessary, inasmuch as the master could not tax the costs of the demurrer without an order declaring it allowed, but might be obtained on a side bar motion.

Upon the motion coming on, *Crooks*, for the plaintiff, considered the motion quite unnecessary, as the plaintiff had chosen to submit to the demurrer rather than have it argued, and such submission had been sent in writing to the solicitor for the defendants.

Grant for defendants.—The practice of the profession in respect to this point is not at all settled; none of the practitioners seem to agree; and with a view of settling the practice of the court in this respect, as well as for enabling the defendants to tax the costs of the demurrer, the solicitor for the defendants deemed it advisable to obtain the order he had given notice of. That an order must be obtained, declaring the demurrer allowed, was quite clear, for otherwise a plaintiff, by submitting to a demurrer to part of his bill, might tie the cause up for ever, as, until the demurrer is allowed, the defendant in such a case cannot move to dismiss for want of prosecution; and besides, the plaintiff could have prevented any necessity for this motion by obtaining an order to amend, and expunging the interrogatory demurred to, as is the usual practice in England. (a)

The plaintiff having given a submission in writing did not place the defendants in any better position than they were in before, for, by the orders of the court, a demurrer to part of the bill is to “be held sufficient, and the plaintiff to have

(a) 1 Smith, 213 & 215.

“submitted thereto, unless the plaintiff shall within three weeks, from the expiration of the time allowed for filing such demurrer cause the same to be set down for argument.”—(28th order of 1st January, 1842).

An order, therefore, being necessary, the only question was, how it is to be obtained, and the solicitor considered it to be the better course to do so upon notice of motion.

THE VICE CHANCELLOR.—I consider an order necessary so as to place the defendants in a position to proceed in the cause, the only question being how it was to be obtained. I do not consider a notice of motion necessary ; the order was clearly intended to obviate the necessity of so doing. However, as the point has now come up for the first time, and the defendants cannot proceed to tax the costs of such demurrer without an order declaring it allowed, I shall grant the order with costs, as on a motion of course.

FRIDAY, 28TH NOVEMBER, 1845.

BROWN V. KINGSMILL.

The court cannot order the decrees of two original suits to be consolidated.

This was a motion to consolidate the decrees pronounced by the court in *Brown v. Kingsmill* and *Kingsmill v. Brown*, the former dismissing the plaintiff's bill to redeem, and the latter directing the specific performance of a contract entered into by the late Robert Innes with the late John Brown.^(a)

Vankoughnet, for plaintiff, considered the bill filed by *Kingsmill* against *Mrs. Brown* might be considered a cross bill, for the answer of *Kingsmill* to the bill filed by *Mrs. Brown* to redeem, although a complete defence to that suit, still the court could not, in that cause, grant the relief to which the defendants were entitled. If *Brown* and *Innes* had both survived, and the same defence made by *Innes* that had been made by his executors, as there is no doubt would have

(a) For the facts of the case see ante, p. 172.

been a cross bill for the relief to which, under the agreement, Innes would have been entitled, would have been necessary, it was equally necessary for those claiming under him to file a bill for the specific performance of the contract; and if not strictly and technically a cross bill, the parties to the two suits not being exactly the same, although they are the same in interest, being the executors and devisees, still, the agreement entered into by the solicitors of the parties to both suits, to use the evidence, &c., taken in one suit, in the other, and have the two causes heard together, rendered the suits so essentially a bill and cross bill that the court would evereise its discretion and treat them as such. When the interest in each suit is the same, the court will treat them as bill and cross bill. (a)

Blake & Esten, contra, considered it impossible that the order could be granted. No one, on looking at the objects for which the several suits were instituted, and perusing the pleadings, can for a moment look upon them as bill and cross bill; every essential to constitute them such is wanting. It is quite true, the defence to the bill to redeem shewed that Brown's devisee had not a right to redeem; but there was not any thing elicited in that suit to show who was entitled to the specific performance of the contract set up; it was necessary to institute a fresh suit for that purpose; and it was merely accidental that Innes' executors were introduced as plaintiffs in the latter suit, they should have been made defendants. The fact that the parties had consented to have the causes come on to be heard together, shews that it was not a cross bill; if it had been so no such consent would have been necessary. The parties to the two suits being in the same interest, is not a ground for consolidating the decrees.—*The Warden and Fellows of Manchester College v. Isherwood*, 2 Sim. 476.

In a cross bill strictly so called the defendant is estopped from saying that the court has not jurisdiction in the subject matter in dispute. In the bill to redeem, Mrs. Brown had not stated anything that could have prevented her from dis-

(a) *Jones v. Jones*, 6 Atk. 110.

putting the jurisdiction in the second suit, had it been open to such objection.—Citing also *Wentworth v. Turner*, 3 Ves. Junr. 3; *Calverly v. Williams*, 1 Ves. Junr. 210.

Vankoughnet in reply.

THE VICE CHANCELLOR.—I cannot see any ground upon which I can possibly make the order asked; although the executors of Dr. Innes are concerned in both suits, still, it was not necessary that they should be so. It might have happened that a stranger had purchased the mortgage: in such a case it would not for a moment be contended that he could be compelled to litigate a question in which he had not a scintilla of interest, namely, the right of Innes' devisees to have the agreement specifically performed. Motion refused, with costs.

PHILLIPS V. CONGER.

SALES BEFORE THE MASTER.—Parties to the suit will not be allowed to bid at the auction, but will be permitted to have a reserved bidding.

In this case a sale had been ordered of certain premises, and a motion was now made by *Esten*: that all parties interested might be allowed to bid at the auction. It appeared that both plaintiff and defendant desired to buy the property; all parties were consenting, and no doubt it would have the effect of causing the property to realize more than could otherwise be obtained for it.

THE VICE CHANCELLOR.—In England the practice is to allow the plaintiff one reserved bidding at sales before the master, and even the propriety of allowing that privilege has been questioned by some judges; the present motion however, is of a very different nature, and such as, if granted, would tend greatly to destroy the confidence of the public, as to the bona fides of sales by this court. At the same time, as all parties to the suit are consenting, I have no objection to allow the plaintiff and defendant to have a reserved bidding each, which will prevent, in a great measure, the property being sacrificed, of which some fears appear to be entertained.

TUESDAY, 25TH NOVEMBER, 1845.

CONNELL V. CONNELL.

PRACTICE.—An answer improperly filed, will be ordered to be taken off the files, upon motion of the plaintiff.

This was a motion to take the answer of the defendant to the amended bill of the plaintiff, off the files of the court, it having been filed after replication to the defendant's answer to the original bill.

Esten, for the plaintiff.—By the registrar's certificate of the state of the cause, it appears that on the 30th day of November, 1844, the plaintiff filed his bill in this court; on the 3rd of July following, the defendant put in his answer thereto; after which, the plaintiff obtained an order to amend, and on the 31st of August last, filed an amended bill without requiring a further answer, and on the 20th October last filed a replication; and further, that on the 14th November, instant, the defendant had filed an answer to the amended bill. The present motion is to take such answer off the files of the court, it having been improperly filed after the plaintiff had put the cause at issue; if the plaintiff were to proceed with the cause with the present answer on the files, the defendant might consider herself entitled to go into evidence upon the facts stated therein. Upon the whole the plaintiff deemed it the more prudent course to make the present motion, as it would probably have the effect of saving such additional expense and trouble to the defendant. There cannot be any question but that the answer has been improperly filed, and the court upon having the subjects brought under its notice, will take the necessary steps to place the pleadings in a proper state.

Ramsay for defendant.—By the 3rd order of 3rd of March 1843, "no answer, plea or demurrer, shall be deemed or considered as duly filed until a copy thereof, authenticated, &c., shall have been served on the solicitor or agent of the plaintiff in the cause."

The question is, when is a pleading *duly* filed? The proper test is, can the party filing it avail himself of it? If not, it is clear it cannot be *duly* filed. The order evidently

means that the plaintiff shall not be bound to notice any pleadings filed by the defendant until a copy shall have been served; here that has not been done—the answer, therefore, according to the words of the order, has not been duly filed, and the plaintiff is not supposed to be aware that it has been; nor is he entitled to make this motion, for the court will not presume that the defendant would attempt to give evidence of the facts contained in that answer, knowing as she must, that she has no right to do so: and, if she did, it would certainly be at her own peril, as she would thereby be subjecting herself to extra costs—that however, is not for the plaintiff to consider.

As to the proper construction to be put upon the expression “duly filed,” he referred to Beame’s Orders of 1646, and Exchequer Orders, 13th November, 1731.

THE VICE CHANCELLOR—considered it the duty of the court to preserve the pleadings in a proper state; and, although a party might choose to run the risk of incurring costs improperly, it was equally the duty of the court, when such proceedings were brought under its notice, to prevent him doing so.

The practice of the court must be kept uniform; and, as the defendant should have at once submitted to the motion, or moved herself to take the replication off the files, and for leave to file her answer to the amended bill, I shall make the order for taking the present answer off the files, with costs.

IN REVIEW.

TUESDAY NOVEMBER 18, 1845.

IN RE SAMUEL WALLACE.

Where a party, being a creditor of a trader, served the notice of demand required to be served on the debtor, and obtained a summons of the Commissioner, calling upon the debtor to appear and either admit or deny the claim of the creditor, according to the provisions of the Bankrupt Act of this Province, and, upon being served with such summons, the debtor appeared and asked for further time, which was granted; after which, and before the time allowed for the party again appearing, the creditor settled

with the trader, taking certain securities for his debt; the costs of the proceedings the trader promised to pay, but afterwards refused; the creditor thereupon applied to the Commissioner under the 71st section of the Act, for an order upon the debtor to pay the costs, which the Commissioner refused; upon a petition filed by the creditor by way of appeal against the decision of the Commissioner, praying this Court to make an order for payment of such costs, the application was refused with costs.

A. Wilson, for petitioner, considered the party who had taken the steps to compel payment of his debt, clearly entitled to the payment of such costs as had been incurred by such proceedings; at common law, under like circumstances, a plaintiff would be entitled to proceed in the cause, and obtain a verdict for nominal damages, upon which he could tax his costs; and the legislature had introduced the 71st section into the statute to meet a case like the present, in which, but for this section, the creditor would clearly have been without remedy.

That the practice in bankruptcy, being administered by so many different and independent judges. it behoved the Court of Review to watch their proceedings narrowly, to keep the practice uniform and, if possible, well defined; that, although the amount here was small, yet it was the full charge for conducting the proceedings so far as they had been carried; and the real point to be considered was not whether an appeal ought to have been brought for the sum in question, but whether an appeal lay from the decision of the judge on the ground complained of; that the proceedings taken before the commissioner were of an adverse character, and the debtor here was the only one benefitted by the arrangement made, and ought to be chargeable with the expense of the necessary steps taken against him; and that, unless relief were afforded in this case, creditors would be induced to press the matter to extremity rather than make a compromise which cast upon them the costs of the proceedings, and which costs in some cases might be of large amount, if the necessary proof had to be obtained from abroad.

Esten, contra, was stopped by the court.

THE VICE CHANCELLOR.—The compounding of bankruptcy is looked on by the law of England with great jealousy, as giving undue preference and advantage to a party taking

steps apparently for the benefit of creditors generally, but in effect solely for his own. This, however, cannot apply to a case like the present, as the law gives to any creditor the right of compelling his debtor to commit an act of bankruptcy, of which any creditor properly qualified may avail himself, unless such debtor appear to the summons and satisfy the summoning creditor, or, &c. In the present case he does appear, and the creditor receives satisfaction for his debt; and by abandoning his proceeding not in, but with a view to bankruptcy, withdraws the case from the hands of the commissioner, who might well consider that he had, in regard to bankruptcy, been exercising only an inchoate jurisdiction, having merely issued the summons, which was not productive of an act of bankruptcy. The fees of these preliminary proceedings are of course, in the first instance, disbursed by the party applying; and, if the bankruptcy proceed, they fall upon the estate. Now, it was entirely within the power of the applicant to have exacted the repayment of these fees when he settled with his debtor; and I do not think it expedient, under the circumstances, to sanction a subsequent suit for their recovery. The commissioner, I think, was right in not entertaining the question. There is little fear of this rule leading to the evil suggested in argument; for the summoning creditor will seldom object to get, by payment or composition, a larger share of his debtor's assets than he could have obtained in consequence of an equal distribution under a commission of bankruptcy; and it is at all times within the power of a debtor so summoned to give the right to such equal distribution to his creditors generally, by refusing to settle or compound with the one.

Wilson hoped the application would be refused, however, without costs, the point being new and of great importance to the profession generally, and had been raised more with a view to obtaining a decision upon the question, than for any interest the petitioner had in the amount demanded.

THE VICE CHANCELLOR.—All I can do is to refuse the prayer of the petition; and the order will be drawn up in the usual manner when a motion is refused.

Petition dismissed with costs.

ON THE PROOF OF HANDWRITING.

(Continued from page 209.)

In thus discussing at length the general rule of law, which rejects all proof of handwriting by direct comparison, and in venturing to question the validity of the principles on which this rule is founded, it is not intended for a moment to deny the existence of the rule, but simply to advocate, however feebly the adoption of another system; and acknowledging the rule to be the law of the land to the fullest extent, it now becomes necessary to advert to *two exceptions*, which have been recognized in courts of justice with more or less distinctness. First, where *other documents, admitted to be genuine, have already been produced as evidence in the cause, the jury may compare them with the writing in dispute*. The reason assigned for this exception is, that, as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the court, to examine the documents for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause. (a) In fact, it is impossible to prevent the comparison, and therefore the exception may be said to rest on necessity. (b) Moreover, this course is supposed to be the less inconvenient, inasmuch as documents which are put in for other purposes would be free from all suspicion of having been unfairly selected. (c) It seems, however, that this last reason would not be universally applicable, since if a paper happens to be admissible, in its own nature, as bearing in however slight a degree on the cause, it cannot be rejected, though it is avowedly put in for the sole purpose of enabling the jury to compare it with another document in dispute. (d) When the holder of a bill which has been endorsed to him by the drawer, brings an

(a) 20 Law Mag. 323, 324; Griffith v. Williams, 1 C. & Jer. 47; Solita v. Yarrow, 1 M. & Rob. 133, per Lord Tenterden; Bromage v. Rice, 7 C. & P. 548, per Littledale and Patteson, Js.; Hammond's case, 2 Greenl. 34.

(b) Doe v. Newton, 5 A. & E. 514; 1 N. & P. 1 S. C.; Eaton v. Jervis, 8 C. & P. 273, per Gurney B. For another application of the same principle see the judgment of Coleridge, J. in Wright v. Doe d. Tatham, 4 Bing. N. C. 500.

(c) R. v. Morgan, 1 Md. & Rob. 135 n., per Bolland B.

(d) Waddington v. Cousins, 7 C. & P. 595, per Lord Denman.

action against the acceptor, who by his plea denies the endorsement alone, the jury cannot compare the endorsement with the drawing, and thus find a verdict for the plaintiff without the intervention of a witness, though the acceptance admits the drawing to be correct, and this is further confirmed by a subsequent acknowledgment by the defendant. (a)

Secondly, where documents are of such antiquity that witnesses who have held a correspondence with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases. (b) It is well known that, as a general rule, such documents, when thirty years old, prove themselves; but, nevertheless, there are occasions when, in order to establish identity, it becomes necessary to prove the handwriting. For instance, if, in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence or if it be required to show the identity of the writer of two ancient documents, only one of which is admissible in the cause, the handwriting must be proved in some legal mode, however ancient the paper may be. (c) The question, then, remains, how is this to be done? Till within a recent date, it has been thought that the proof might be established in one or both of two ways, either by producing other documents admitted to be genuine, or prove to have been respected, treated, and acted upon as such by the parties interested in them, and then permitting witnesses, whether experts or others, and perhaps even the jury, to compare such documents directly with the paper in dispute; (d) or by calling witnesses who, from a prior examination of these documents, could, without an actual comparison, pronounce their belief as to whether or not the instrument, in question were written

(a) *Alport v. Meek*, 4 C. & P. 267, per Tindal, C. J.

(b) *Doe v. Suckermore*, 5 A. & E. 717, 718, per Coleridge, J.; 724, 725, per Williams, J.; 726, per Patteson, J.; 747, 748, per Lord Denman.

(c) *Tracy Peerage*, 10 Cl. & Fin. 154; *Fitzwalter Peerage* id. 193; *Morewood v. Wood*, 14 East, 328; *Taylor v. Cook*, 8 Price, 652.

(d) *Davies v. Lowndes*, 7 Scott, N. S. 168, 169, 209; *Doe v. Tarver*, Ry. & M. 143, per Abbott, C. J.; *Anon.* cited *id.* per Lawrence, J.; *Roe v. Rawlings*, 7 East, 282, n., per Le Blanc, J. on two occasions; *Morewood v. Wood*, 14 East, 328; per Hotham, B.; *Taylor v. Cook*, 8 Price, 652, 653, per Richards, C. B.

by the same hand.(a) But, though, in the case of *Doe v. Suckermore*, the judges of the Court of Queen's Bench, differing as they did with respect to the immediate question before them, appear to have recognized the legality, if not of both modes of proof, at least of the latter ;(b) yet the House of Lords, by a very recent decision, have thrown much doubt on the subject, if they have not expressly overruled the practice that had hitherto prevailed.

The question arose on the claim of Sir B. W. Bridges to the Barony of Fitzwalter,(c) when it became necessary to shew that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years ago by the ancestor of the claimant, was in fact written by him. To establish this fact, an inspector of official correspondence was called, who stated that he had examined the signatures attached to two or three documents which were admitted to have been executed by the ancestor;—that they were written in a remarkable character; and that his mind was so impressed with that character, as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. The Attorney-General having objected to the testimony of this witness, on the ground that he had gained his knowledge of the handwriting, *not* from a *course of business*, like a party's solicitor or steward, but from *studying* the signatures for the express purpose of speaking to the identity of the writer, the Lord Chancellor and Lord Brougham were clearly of opinion that the testimony was inadmissible; the latter noble lord observing, that the cases of *Doe v. Tarver* and *Sparrow v. Farrant*,(d) if correctly reported, had gone further than the rule was ever carried;—that the Lord Chief Justice entertained the same views on this last subject; and that if, as was doubtless the case, such kind of evidence had been often received, it was only because no objection had been raised. The family solicitor of the claimant was then called; and having stated that he had

(a) *Sparrow v. Farrant*, 2 St. Ev. n.(c) per Holroyd J.; *Doe v. Lyne*, 1 Ph. Ev. n. 1 per id.; *Beer v. Ward*, cited id. per Dallas, C. J.; Anon. per Lord Hardwick, cited B. N. P. 236.(b)

(b) Law Rev. p. 296, note 5. (c) *Fitzwalter Peerage*, 10 Cl. & Fin. 193.

(d) Law Rev. p. 297, notes 2 & 3.

acquired a knowledge of the ancestor's handwriting from having had occasion, at different times, to examine, in *the course of his business*, many deeds and other instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. The distinction drawn between these two witnesses is obvious. The former had studied the signatures admitted to be genuine with the avowed purpose of discovering a similitude between them and the writing in dispute, and might well be supposed to bring to the investigation that bias in favour of the party calling him, which is proverbially displayed by scientific witnesses; (a) the latter had acquired his knowledge incidentally and unintentionally, under no circumstances of prejudice or suspicion; and what is especially worthy of remark, without reference to any particular object, person or document. (b) Coupling this decision with the case of *Brockbard v. Woodley*, (c) in which Mr. Justice Yates refused to permit the proof of an old paper by comparison, it may, perhaps, be stated as the better opinion, that, in strict law, the handwriting of *ancient* documents must be proved by some witness who has become acquainted with it in the ordinary course of his business, and that it will not be allowable either to call a scientific witness, who has obtained his knowledge by studying other documents in the same handwriting, or to produce such documents to the jury, provided they be not admissible for some other purpose, in order to enable them to form a comparison.

But, be this as it may, the case of the Fitzwalter peerage furnishes a strong *à fortiori* argument in favour of the rejection of a skilled witness, who is called to prove or disprove the signature of a *modern* instrument, and whose sole knowledge of the handwriting has been derived from the study of other papers, which are proved or admitted to have been written by the party whose signature forms the matter in dispute. It may therefore be safely affirmed, that the arguments of Mr. Justice Coleridge and Mr. Justice Patteson, who, in *Doe v. Suckermore*, would have rejected such tes-

(a) *Tracy Peerage*, 10 Cl. & Fin. 191, per Lord Campbell.

(b) *Doe v. Suckermore*, 5 A. & B. 731, 735, per Patteson, J.

(c) *Pea. R.* 21.

timony, are consistent with sound law as at present understood.(a) Whether a witness, who has in his possession a paper which he has seen the party write, or which he has received from the party in the course of correspondence, can recur to it at the trial for the purpose of refreshing his memory, in a question which admits of much doubt. Such a course was permitted on one occasion by Mr. Justice Dallas;(b) but the correctness of this ruling, though apparently recognized by one learned judge, has been expressly questioned by another;(c) and as the leaning of the courts, for some years past, has been rather to limit, than to enlarge, the rule respecting proof of handwriting, it is presumed that this practice would not now be allowed. It is true that, in such a case, there is little danger of an unfair selection of specimens, and therefore, so far as that danger constitutes the ground for rejecting comparison, it does not apply; but the practice is still open to the objection that it enables the witness to speak to his belief, not from the *revived* impression on his mind, but from a *new* impression made during the progress of the cause, in a manner that the law does not sanction.

Though scientific witnesses cannot, as before mentioned,(d) prove ancient or modern documents, either by actual comparison, or by studying other papers for the purpose of qualifying themselves to give evidence respecting the document in dispute, it seems that their testimony will be admissible in *two cases*. First, if the writing be *ancient*, they may state their belief as to the probable period at which it was written,

(a) 5 A. & E. 703; 2 Nev. & P. 16, S. C. In this case a defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, eighteen other signatures were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, who had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard in court. Per *Ld. Denman, C. J., and Williams, J.*, such evidence was receivable; per *Patteson and Coleridge Js.*, it was not.

(b) *Burr v. Harper*, Holt, N. P. R. 420.

(c) In *Doe v. Suckermore*, 5 A. & E. 724, *Williams, J.* cited *Burr v. Harper*, as sound law, but *Patteson, J.* denied that the decision was right, p. 737.

(d) *Law Rev.* p. 297-299.

because, as the character of handwriting varies according to the progress of civilization, antiquarian knowledge may afford much assistance in arriving at a right conclusion ;(a) and, secondly, if the question be whether a paper is written in a *feigned* or *natural* hand, witnesses whose duty it has been to detect forgeries will, perhaps, be admissible, in this country, as they certainly are in America,(b) on the ground that such persons are supposed to be more capable than ordinary men to pronounce a safe opinion on a subject of this nature.(c) Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little, if any, weight will be attached to their evidence,(d) and the courts will jealously take care that their answers are confined within the strict bounds of the exception. Thus, on the trial for an information of a libel, a post office clerk, though permitted to state his belief that the libel was in a feigned hand, was not allowed to examine a letter written by the defendant, and then to give his opinion as to whether the same hand wrote both papers.(e) This was clearly an act of comparison, and the fact, if it was one, that the handwriting of the libel was in a disguised character, was not considered a sufficient reason for varying the general rule.

There is one remaining point connected with this subject, on which doubts are still entertained; we allude to

(a) *Doe v. Suckermore*, 5 A. & E. 718, per Coleridge, J.; *Tracy Peerage*, 10 Cl. & Fin. 154.

(b) *Hammond's case*, 2 Greenl. 33; *Moody v. Rowell*, 17 Pick. 490; *Comth. v. Carey*, 2 Pick. 47; *Lyon v. Lyman*, 9 Conn. 55; *Hubly v. Vanhorne*, 7 S. & R. 185; *Lodge v. Phipper*, 11 S. & R. 333. In America, the skilled witness may compare the writing in a feigned hand with other writings already in evidence in the cause. See cases above.

(c) *R. v. Cator*, 4 Esp. 117, 145, per Hotham, B.; *Goodtitle v. Braham*, 4 T. R. 497; *Doe v. Suckermore*, 2 Nev. & P. 18; *Fitzwalter Peerage*, 10 Cl. & Fin. 198, per Ld. Brougham. See *Gurney v. Langlands*, 5 B. & A. 330, where Wood, B. having rejected such evidence, the court refused a new trial, and *Carey v. Pitt*, Pea. Add. R. 130, where Ld. Kenyon acted in the same manner as Wood, B. See also the observations of Ld. Denman in *Doe v. Suckermore*, 5 A. & E. 751.

(d) *Tracy Peerage*, 10 Cl. & Fin. 191, per Ld. Campbell, *Gurney v. Langlands*, 5 B. & A. 330.

(e) *R. v. Cator*, 4 Esp. 117, 145, 146, per Hotham, B. Persons who feel an interest in tracing a similarity between feigned and natural handwriting, are referred to the 4th vol. of Lord Chatham's Correspondence, where at p. 37 of the fac-similes of autographs, they will find a curious comparison of the upright writing of Junius with the running hand of Sir Philip Francis.

the question, how far the knowledge of a witness, who is called to prove handwriting, may be tested by showing him other documents, not admissible as evidence in the cause, and then asking him whether they are written by the same hand as the paper in dispute. Mr. Baron Parke, some years back, not only permitted this course to be adopted, but allowed all the papers to be shewn to the jury, in order that they might see the degree of credit to which the witness was entitled;(a) but in *Griffiths v. Ivory*,(b) where several witnesses being called to establish a signature, the opposite party proposed to ask each of them whether another irrelevant paper was written by the same person, purposing to test their knowledge by the agreement or disagreement of their testimony on this point, the Court of Queen's Bench decided that the question could not be put; and Lord Denman added, that it was immaterial whether it could or could not be proved that the paper, used as a test, was written by the party whose signature was disputed. This decision has been since acted upon by Mr. Baron Parke in one case at *Nisi Prius*,(c) but the Court of Exchequer has very recently questioned the soundness of the rule as laid down in the Court of Queen's Bench.(d) The question thus arose: A witness, being called to disprove an acceptance, which was signed "Robert Honner," gave as a reason for denying the genuineness of the signature, that the acceptor always signed his name "R. W. Honner." The opposite counsel, in cross-examination, put into his hand another irrelevant document, which was signed in the same manner as the acceptance, and the witness having admitted that this was written by the acceptor, he was asked whether the document was not signed "Robert Honner," and whether he would persevere in saying that the acceptor always signed his name "R. W. Honner?" An objection being taken to this

(a) Per Parke, B., in *Hughes v. Rogers*, 8 M. & W. 125. His lordship's ruling was not afterwards questioned, though a bill of exceptions was tendered. *Id.*

(b) 11 A. & E. 322; 3 P. & Dav. 179.

(c) Per Parke, B., in *Hughes v. Rogers*, 8 M. & W. 125.

(d) *Younge v. Honner*, 2 M. & Rob. 537; 1 C. & Kir. 51. S. C. Nom. *Younge v. Honner*.

course of cross-examination, Mr. Baron Alderson, after consulting the full court, stated, that all the barons were of opinion that the question might be put, (a) observing, that if in the document, which the witness admitted to be an autograph, the peculiarity existed on which he relied, as disproving the genuineness of the signature in dispute, that must be a circumstance by which to test the value of his belief on the subject. His lordship added, that if the witness had denied the genuineness of the document produced as a test, he should not have allowed any issue to be raised on that point. (b) The last part of this ruling is entirely in accordance with the case of *Hughes v. Rogers*, (c) where a witness having denied that the signature of an attesting witness to a bond was genuine, and having further denied that another paper, not in evidence in the cause, was written by that person, the court decided that he could not be contradicted by calling persons to prove that this last paper was actually written by the attesting witness.

The rules deducible from these cases would seem to be these: first, that if a witness is called to prove or disprove a writing, any documents, though inadmissible in the cause, may be put into his hand on cross-examination, and he may be asked whether such documents are or are not written by the person who is supposed to have written the paper in dispute; secondly, if he denies that these documents are so written, witnesses cannot be called to contradict him, nor can the documents be shewn to the jury; and lastly, if he admits that they were written by such person, he may be further cross-examined as to the reasons for the belief he has expressed respecting the disputed paper. Thus, if he considers it genuine on the ground of some peculiarity in the signature, he may be asked whether such peculiarity is ob-

(a) In *R. v. Murphy*, 1 Arm. Mac. & Ogle, 204. Pennefather, C. J. would not allow this course of cross-examination, as his lordship considered that it must end in comparison of handwriting; but in *R. v. Caldwell*, id. 324, Perrin, J. and Richards, B. held that a witness, who had denied the handwriting of the paper in dispute, but had admitted the genuineness of other irrelevant documents, might be questioned as to any similarity between them, provided the passages in each supposed to be alike were pointed out to the witness by the hand, and were not read aloud, so as to go to the jury.

(b) *Younge v. Honner*, 2 M. & Rob. 536.

(c) 8 M. & W. 123.

servable in the paper he has admitted to be an autograph ; if for the same reason he rejects the disputed writing as spurious, he may be asked whether in the paper offered as a test the same peculiarity does not prevail ; and, in either case, the court would probably permit the irrelevant documents to be laid before the jury, not that they might judge of the genuineness of the paper in dispute by comparing it with these, but that they might be enabled to appreciate the testimony given by the witness. (a) Whether the course proposed to be pursued in *Griffiths v. Ivory* was correct or not, is another question, and one which, until some further decision is pronounced upon the subject, it would be mere speculation to attempt to resolve.

It remains only to be observed, that the rules of evidence which govern the proof of handwriting, are precisely the same in criminal as in civil proceedings ; though in favour of life and liberty, judges will naturally feel more disposed than they would be in ordinary disputes between man and man, to resist any endeavour to infringe these rules, or to introduce evidence of a doubtful description. (b)—*Law Review*.

NOTES OF LEADING CASES.

SUFFICIENCY OF THE CONSIDERATION OF A SIMPLE CONTRACT.

KAYE v. DUTTON, 8 SCOTT, N. R. 495.

The principle, that some consideration is requisite, in order to support a parol promise, must of course be sufficiently familiar to our legal readers. This principle obtained in the Roman law, and is thus concisely stated in the second book of the Digests, tit. xiv. s. 7, § 4, *nuda pactio obligationem non paret* ; and in the second book of the Code, tit. iii. s. 10, we find the rule adverted to that *ex pacto actionem non nasci*,

(a) *Younge v. Honner*, 1 C. & Kir. 53., per Alderson, B.

(b) *R. v. Cator*, 4 Esp. 117, 144, per Hotham, B.; *R. v. De la Motte*, 21 How. St. Tr. 810, per Butler, J., and see 779 S. C.

and stated to apply where there is merely a *nudum pactum*. The case which is usually cited in our own courts as establishing the same rule, is that of *Lampleigh v. Brathwait* (Hobart R. 105), where it was resolved that “a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.” With respect to the nature of the consideration on which an assumpsit may be founded, it is laid down in *Com. Dig. tit. Action upon the Case upon Assumpsit*, that the consideration must be “for the benefit of the defendant, or to the trouble or prejudice of the plaintiff.” “Consideration,” observes Mr. Justice Patteson, in *Thomas v. Thomas*, (2 Q. B. 859), “means something which is of some value in the eye of the law moving from the plaintiff.” And in *Selwyn’s Nisi Prius*, 41, 10th ed., consideration is defined to be, “any act of the plaintiff from which the defendant derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, if such act is performed or such inconvenience suffered by the plaintiff, with the consent either expressed or implied of the defendant.”

In *Bourne v. Mason* (1 Vent. 6) the facts were, that A. was indebted to the plaintiff in a certain amount, and that B. was indebted to A. in a certain other amount, whereupon the defendant, in consideration of being permitted by A. to sue B. in his name, promised to pay A.’s debt to the plaintiff; A. having given such permission, and the defendant having recovered from B., the plaintiff brought his action for the amount of the debt originally due to him from A., and after verdict the judgment was arrested, on the ground that plaintiff was a mere stranger to the consideration for the promise made by the defendant, having done nothing of trouble to himself or of benefit to the defendant. In this case, therefore, the action was held not to be maintainable, because there was no legal consideration at all for the defendant’s promise. The case of

Haigh v. Brooks, (10 A. & E. 309) is an authority to shew that a consideration possessing some value will be sufficient to support a promise. (See per Cresswell, J. Allnutt v. Ashendan, 6 Scott, N. R. 131.) In that case the consideration alleged in the declaration was the giving up a certain guarantee, and the defence was, that this guarantee was void under the statute of frauds, as not disclosing any consideration on the face of it, and that consequently the agreement made with the plaintiff was in fact a nudum pactum; on looking at the guarantee, however, the Court of Queen's Bench were of opinion that the question as to its validity was open to discussion, and that there was, at all events, sufficient doubt to make it worth the defendant's while to possess himself of the guarantee, and Lord Denman in delivering judgment made the following remark, which is opposite to our present subject; "we are by no means prepared to say that any circumstances short of the imputation of fraud, in fact, could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable."

In Kaye v. Dutton, *supra*, the plaintiff declared in assumpsit upon an agreement, reciting that a certain estate had been mortgaged by one Whitnall, since deceased, and that the plaintiff had joined in a bond as a collateral security for the mortgage money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of Whitnall's affairs, had repaid to the plaintiff part of the money which he had paid, and had agreed to pay him the residue, amounting to 83*l.*, out of the proceeds of the mortgage property, when sold, and in the meantime to appropriate the rents of the premises to the payment of such residue, inasmuch as the plaintiff had a lien upon the premises for the same. The agreement further recited that the defendant had requested the plaintiff to release and convey his interest in the mortgaged property to certain parties, and that he had done so, *reserving to himself a lien on the property* as aforesaid; and it then proceeded to state that the defendant in consideration of the plaintiff having paid the money and having released all his estate and interest as above-mentioned, *reserving to himself the said lien*, undertook and agreed to pay

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him the said sum of 83*l.*, with interest thereon. Now in *Copis v. Middleton* (Turn & Russ. 224) it was held, that if at the time a bond is given a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee, that is to say, he has a lien upon the mortgaged property for the satisfaction of his claim against his principal; and inasmuch as the mortgagor cannot get back his estate again without a conveyance, the security remains a valid and effectual security for the ultimate repayment to the surety of the money advanced by him. Consequently, in the case of *Kaye v. Dutton*, to which we wish particularly to direct attention, the reservation of the plaintiff's lien in his release and conveyance was, in fact, a reservation of the only interest which, according to the rule of equity above noticed, he had in the premises so conveyed, and the release and conveyance, by which the plaintiff really parted with nothing, was therefore held to form no legal consideration, for the defendant's alleged promise. In delivering judgment, Tindal, C. J. remarked, that the case resembled that of *Edwards v. Baugh* (11 M. & W. 641), where the declaration stated that certain disputed and controversies were pending between the plaintiff and defendant as to whether the defendant was indebted to the plaintiff in a certain sum of money, and thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the said sum in dispute, but would accept a smaller sum in full satisfaction, the defendant promised to pay such smaller sum. The declaration was held on general demurrer, because it contained no allegation that a debt was actually due from the defendant to the plaintiff, and because it did not shew either expressly or by implication that a *reasonable doubt* existed between the parties as to the fact of such debt being due. "I think," observed Mr. Baron Rolfe, "the plaintiff is bound to shew a consideration, in the shape of something either beneficial to the opposite party or detrimental to himself."

Another objection, which was taken to the declaration in *Kaye v. Dutton*, was this: that an executed consideration will only sustain such a promise as the law will imply; that here

the consideration, if any, was executed, and that the promise alleged was *not* such as would have been implied by law from the given circumstances. In *Hopkins v. Logan* (5 M. & W. 241) it was held, that where the consideration is executed, and where the implied promise would be to pay on request, as in the case of an account stated, such consideration is not sufficient to support a promise to pay at a future day, and several other cases will be found cited in the judgment (8 Scott, N. R. 502), which support the following proposition; that where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, *differing from that which by law would be implied*, can be enforced. We may further observe generally, that in order to sustain an action of assumpsit there must be—1. A request either expressed or implied. 2. A consideration of some value in the eye of the law; and 3. A promise, either express, or such as the law will from certain facts and circumstances imply. The case of *Lampleigh v. Brathwait*, *supra*, is an instance of the necessity of an *express* request. The very recent decision in *Victors v. Davies* (12 M. & W. 758), (a) proceeded on the ground that a request must necessarily be inferred from particular facts: that was an action of assumpsit for money lent, and it was observed by Pollock, C.B., that the statement that the money was lent implies that it was advanced at the request of the defendant; so where A. makes a payment on account of B., but without his knowledge or request, and B. subsequently assents to this payment, an antecedent request by him will be implied. (See also *Nordenstrom v. Pitt*, 13 M. & W. 723). In cases where the law would raise an implied promise, it certainly seems, on the authority of the cases above referred to, that no express promise differing therefrom can be enforced; and as observed by Tindal, C. J., these cases may have proceeded on the principle, that the consideration was exhausted by the promise implied by law from the very execution of it, and that consequently any promise afterwards made must be *nudam pactum*, there remaining no consideration to support it.

(a) See Law Magazine, N. S., No. 3, p. 406.

Another class of cases may however occur, in which there is a consideration, from which the law would not imply a promise as where the party suing has sustained a detriment to himself or conferred a benefit on the defendant *at his request*, under circumstances which would not raise any implied promise. In such case it appears to have been held in some instances that the act done at the request of the party charged is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. (Judgment, 8 Scott, N. R. 502, 503.) And this view of the subject seems quite in accordance with the resolution in *Lampleigh v. Brathwait*, that a courtesy, if moved by a request of the promiser, will bind, because in this case the subsequent promise is not naked, but couples itself with the previous request.

The decision of the court in *Kaye v. Dutton* shews that although it may in ordinary cases be very easy to determine whether there be a sufficient consideration for the alleged promise, yet circumstances may and do occur in which that which at first sight appears to constitute a good consideration will, on further investigation, prove insufficient, as causing no detriment to the plaintiff or benefit to the defendant; and this case likewise shews how necessary it is before drawing the declaration on an *assumpsit*, when the consideration is executed, to determine—1st. Whether from the facts submitted there be *any* promise implied by law; and 2nd, If there be such an implied promise, what is its precise nature? Having determined these points, the pleader will be careful to allege no promise different from that which would be by law implied.

We shall conclude these remarks by considering very shortly another question, which was raised in the argument in *Kaye v. Dutton*, but which it was unnecessary for the court to decide: viz., whether a mere *moral* consideration, to which the law will give no effect, is sufficient to support a subsequent promise. It certainly seems singular that a question so interesting and important as this should not have been formally decided, especially when we consider how frequently the attention of courts of law is directed to

the nature and sufficiency of the consideration for a promise. The cases of *Lee v. Muggeridge* (5 Taunt. 36), *Watson v. Turner* (Bull. N. P. 147), and some others, which will be found collected and commented upon in the note to *Wennall v. Adney* (3 B. & P. 247), are usually cited as favouring an affirmative answer to the above question; but we apprehend that the authorities in support of the negative will, on investigation, be found greatly to prevail. In *Littlefield v. Shee* (2 B. & Ad. 811) Lord Tenterden, although he does not go to the extent of overruling *Lee v. Muggeridge*, observes, that "the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation," and this observation of the above very learned judge is cited and approved of by the Court of Queen's Bench in *Monkman v. Shepherdson* (11 A. & E. 415), and in *Eastwood v. Kenyon* (11 A. & E. 447), where the same court expressly adopted the conclusion deduced from the authorities considered in the note to *Wennall v. Adney*, already alluded to. This conclusion is, that an express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule at law, but can give no original cause of action, if the obligation on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." In the course of the judgment, in *Eastwood v. Kenyon*, delivered by Lord Denman, his Lordship observed, that the doctrine of the sufficiency of a moral consideration would, if carried out, annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it, and likewise that "the enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts; suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to

the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult." In addition to these authorities, we may call in aid a remark of Parke, B., in *Jennings v. Brown* (9 M. & W. 501) to the effect that a mere moral consideration "is nothing," and of Tindal, C. J., in the principal case (8 Scott, N. R. 499) that "no doubt a subsequent express promise will not convert into a debt that which of itself was not a *legal* debt;" and we think we may in conclusion venture to affirm, as a proposition consistent with the principles of law and of common sense, that a mere promise to do that which never could have been enforced before a legal tribunal, however binding it be *in foro conscientiæ*, will not suffice at law to sustain an action of *assumpsit*.

The case of *Kaye v. Dutton* may be conveniently noted in *Chitty on Contracts*, third edition, 48.—*Law Magazine*.

POINTS OF PRACTICE.

WHEN A NEW TRIAL WILL BE GRANTED, THE VERDICT BEING AGAINST EVIDENCE.

HALL v. POYSER, 13 M. & W. 600.

The most ancient proceeding recognised by the common law in case of a wrong verdict being returned by the jury summoned to try an issue joined between the parties to an action, was by the writ of attain, so called, according to Sir E. Coke (1st Inst. 294 b), from the Latin word *tinctus* or *attinctus*, "for that if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever;" the punishment inflicted for this offence, in case of conviction, being moreover extremely severe, as will be seen by a reference to the passage in Coke's Commentaries immediately following that above cited. The rigour of the law was, however, mitigated in this respect by the stat. 23 Hen. VIII., c. 3, and the writ of attain was altogether abolished by the stat. 6 Geo. IV. c. 50, s. 60, which enacted, that from and after the passing of that act

it should not be lawful, either for the king or any one on his behalf, or for any party or parties in any case whatsoever, to commence or prosecute any such writ against any jury or jurors for the verdict by them given; or against the party or parties who should have judgment upon such verdict. With reference to the latter part of this passage, we may observe, that the object of the writ of attain was twofold, 1st, to punish the jury for their false verdict, as already stated, and 2nd, according to Sir H. Finch, in his discourse of Law, p. 484, to reverse the judgment following upon such verdict, and to restore the party to all that he had lost thereby. At the present day, we apprehend, that practically there is no mode of punishing a jury for returning a wrongful verdict; but in this case the party aggrieved may obtain redress by applying to the court in banco, who will, if sufficient cause be shewn, set aside the verdict, and grant a new trial. One of the grounds for granting such new trial is, misconduct of the jury, provided it be such as to satisfy the court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, which is essential for the proper exercise of those highly important duties which jurymen are called upon to discharge. In like manner, if the verdict be a *perverse* verdict, or clearly contrary to evidence, it will be set aside by the full court, and a venire de novo will be awarded. *Mellin v. Taylor* (3 B. N. C. 109) is a striking instance of that particular branch of the discretionary jurisdiction of the courts to which we now refer. This was an action to recover damages for criminal conversation with the plaintiff's wife; the evidence was extremely conflicting, although certainly the weight of evidence was in favour of the plaintiff, the jury however found for the defendant; a new trial was subsequently moved for on the ground that the verdict thus given was against evidence; and although it was contended on behalf of the defendant, that where there is evidence on both sides it is not the practice to set aside the verdict merely because the court may form an opinion as to the weight of the evidence different from the

opinion of the jury; yet the rule was made absolute, Tindal, C. J., after a *cur. adv. vult.* thus delivering judgment: "We agree that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict except that it is formed in the opinion of the court against the weight of the evidence, the court ought to exercise not merely a cautious, but a strict and sure judgment before they send the case to a second jury. The general rule under such circumstances is, that the verdict once found shall stand, the setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence. The argument before us has gone the length of contending that if we send this case to a second trial we invade the province of the jury, and in the particular instance before us almost insure a verdict against the defendant. I cannot conceive how the benefit of trial by jury can be in any way impaired by a cautious and prudent application of the corrective which is now applied for; on the contrary, I think that without some power of this nature residing in the breast of the court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public." So in the language of Lord Kenyon, *Wilkinson v. Payne* (4 T. R. 469). "In the case of new trials it is a general rule that in a *hard* action, where there is something on which the jury have raised a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial where the objection does not lie in point of law." These remarks of the two very learned judges above named will serve as a sufficient introduction to the case of *Hall v. Poyser* (13 M. and W. 600). This was an action by the drawers against the acceptor of a bill of exchange for 50*l.*, plea that "after the said acceptance by the defendant of the said bill of exchange, and before the cause of action accrued to the plaintiffs, the defendant delivered to the plaintiffs, who then accepted and received from the defendant, divers goods of the defendant in satisfaction and discharge of the said bill of exchange and of the said promise of the defendant." Replication, traversing the acceptance of the goods in satisfac-

tion and discharge modo et formâ, and issue thereon. At the trial there was conflicting evidence respecting the fact thus at issue between the parties; it likewise appeared that the defendant, having become embarrassed, had, prior to the transactions with the plaintiff out of which the action on the bill arose, paid his other creditors a composition of ten shillings in the pound. The jury found a verdict for the plaintiffs, damages 25*l.*, and this verdict the defendant obtained a rule nisi to set aside, on the ground that it was against evidence and did not decide the issue raised between the parties; the question for the consideration being, as it was contended, whether the bill sued on was satisfied by the delivery of the goods. It was argued, that if the bill was not satisfied, the plaintiffs were entitled to recover the whole amount of it; if it was, the defendant was entitled to the verdict. The court, however, after argument, discharged the rule nisi; and Alderson, B., thus expressed his opinion on the point which had been raised: "The jury," observed the learned baron, "have decided the issue in favour of the plaintiffs, and have given them a verdict for 25*l.*, which they find to be the amount of the damages. If that could be accounted for only on the supposition, that having disagreed as to whether the verdict should be for the plaintiffs or defendant, they had split the difference, the defendant would certainly be entitled to a new trial. But they may have found their unanimous verdict for the plaintiffs, and given them as *an equitable amount of damages*. Of this the plaintiffs do not complain; and I think, therefore, that we ought not to disturb the verdict." The case affords a good illustration of the rule, which will be found laid down in the books of practice, viz., that if the verdict be such as justice and equity require, the court will not disturb it, although there be conflicting evidence, and although the weight of such evidence may appear to preponderate against it. A note of Hall v. Poyser may be made in 1 Chit. Arch. Pr. 7th edit. 1089.—*Law Magazine*.

PEREMPTORY UNDERTAKING TO TRY AT A PARTICULAR SITTING IS AN ABSOLUTE CONDITION, THE BREACH OF WHICH ADMITS OF NO EXCUSE.

PETRIE v. CULLEN, 8 Scott, N. R. 705.

The above decision is of importance with reference to the stat. 14 Geo. II. c. 17, from which the Courts of Westminster derive the power of giving judgment as in case of a nonsuit, where the plaintiff in an action neglects to go to trial according to the regular course and practice of said courts, in which case the first section of the above statute enacts, that "it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court (due notice having been given thereof) to give the like judgment for the defendant or defendants in every such action or suit as in cases of nonsuit, unless the said judge or judges shall upon just cause and reasonable terms allow any further time or times for the trial of such issue, and if the plaintiff or plaintiffs shall neglect to try such issue within the time or times so allowed them, in every such case the said judge or judges shall proceed to give such judgments as aforesaid." In *Petrie and another v. Cullen*, *supra*, a rule nisi for judgment as in case of a nonsuit was obtained, the plaintiffs having neglected to proceed to trial at the proper time, and this rule was subsequently discharged upon a peremptory undertaking by them to try at the sittings after term therein specified. The cause, however, was not entered for trial until the last day for entering causes for the sitting, and in consequence of its being so low on the list it was necessarily made a remanet; the defendant under these circumstances obtained a rule absolute for judgment as in case of a nonsuit, and on motion to set aside the above rule and the judgment signed in pursuance thereof, the question was simply this, whether or not the plaintiffs had sufficiently complied with the undertaking entered into by them as above mentioned. On their behalf it was argued that their undertaking was to proceed to trial according to the course and practice of the court, and that they had literally complied with such undertaking

so far at least as was practicable, the cause having been entered for trial *within the time allowed by the practice of the court*, and the trial having been postponed without any default on their part. In answer to this argument, however, it was observed by Maule, J. "The question is, whether the undertaking is an absolute one to try the cause at all events, or whether it is satisfied by the plaintiffs' doing what they reasonably could do to get the cause tried. It seems to me that it is as absolute as an undertaking to pay a given sum on a day named. From the course they pursued, I think the plaintiffs clearly meant that the cause should not be tried at the last sittings." With respect to the correctness of the first position thus laid down by the learned judge, we must observe that Tindal, C. J., expressed some doubt, the Lord Chief Justice relying upon the peculiar circumstances of the case, which in his opinion clearly indicated a *wilful default* on the part of the plaintiffs; the judgment of Erle, J., moreover entirely proceeded on this latter ground. "It appears to me," he remarks, "that the plaintiffs in the case have done all they could to prevent the cause from being tried at the last sittings." The rest of the court, however, consisting of Coltman, J., and Maule, J., certainly adopted, we think with good reason, the general rule as laid down by Coleridge, J., in *Ward v. Turner*, (5 Dowl. 22), according to which rule the meaning of a peremptory undertaking is, that the party undertakes at all events and without any reservation or exception, that the trial shall take place within the time limited, so that he will be responsible even if there be no moral fault and no neglect on his part, and although he had no control over the circumstances which prevented the trial. This rule of practice may, it is true, like any other inflexible rule, occasionally be productive of hardship to the party undertaking to go to trial, but on the whole it appears the most convenient as well as the most just and reasonable that can be devised.

Note the above case in 2 Chit. Arch. Pr. 7th ed. 1079.—*Law Magazine*.

THE UPPER CANADA JURIST.

IN CHANCERY.

22ND NOVEMBER AND 12TH DECEMBER, 1845.

MERRITT V. TOBIN.*

INJUNCTION—PAYMENT OF MONEY INTO COURT.

A suit having been brought for the specific performance of an agreement of compromise, and after amendment of the bill and a special injunction granted, on the merits confessed in answer to the original bill, restraining proceedings at law, judgment was obtained in an action brought by the defendants for the recovery of the whole amount originally claimed, but which the plaintiff had always denied his liability to pay, a motion was made—amongst other things for the payment into Court of the amount of the judgment, or for security for the performance, by plaintiff, of the decree of the Court. Payment into Court refused, but security ordered to be given for the performance of the articles of compromise, in the event of the same being decreed.

The pleadings in this cause shewed that Merritt and one George Adams (now deceased) were possessed of certain mills, &c., in St. Catharines, called “The Welland Canal Mills,” as tenants in common; Merritt having the fee simple in three-fourths, and Adams in the one-fourth part thereof; and being so possessed, had, by articles of agreement, dated 30th July, 1835, contracted and agreed with one Thomas Scott for the sale unto him of one-tenth part of said premises; that he was thereupon admitted into possession, and had paid 50*l.* 12*s.* 4*d.*, on account of purchase money, but no conveyance executed.

That Merritt, Adams & Scott, having become indebted to Samuel Street, Esquire, in the sum of 1,500*l.*, a mortgage to secure the payment of that amount was executed by Merritt and Adams, with the consent, &c., of Scott; and that default had been made in payment of said debt.

* The facts of this case are reported at greater length than may be considered necessary on the present motion, in order to avoid a repetition thereof, in any report that it may be necessary to make of the cause at any subsequent stage of the proceedings.

That by a certain deed of the 28th of August, 1839, and made with like consent of Scott, between Merritt and Adams, of the one part, and John Mittleberger and Beacher Benham, of the other part; and reciting that Merritt and Adams had let the said premises to Mittleberger for three years, and that Mittleberger had determined to carry on business with Benham, during the said term, as Mittleberger & Co.; and that Mittleberger and George Rykert had carried on business at St. Catharines under the name, &c., of George Rykert & Co.; and that Mittleberger and Benham had also carried on business with Rykert, under the style, &c., of Rykert, Mittleberger & Co.; and that by agreement the said firms had been dissolved on the 15th day of July, then last; and that Rykert had let to Mittleberger all his interest in the firms for three years, under certain covenants, &c. Merritt and Adams demised said premises to Mittleberger and Benham for three years, from 15th July, then last, at certain rents, &c. And Merritt and Adams covenanted and agreed with Mittleberger that they would from time to time, &c., during the period therein limited, and during the solvency of the firm of John Mittleberger & Co., upon the request of John Mittleberger, and exhibition of the books of the said firm, if required, endorse such notes, accept such bills, &c., as he might require or desire, together with the said George Rykert, to the extent of 12,500*l.*; and beyond that sum without him in such sums as Mittleberger should require for use of said firm. And it was agreed by said deed that should Mittleberger, in the firm of Mittleberger & Co., sustain losses by the business, exceeding the profits thereof, the said demised premises of Merritt and Adams should be liable thereto in the proportions therein mentioned.

That Merritt and Adams had executed a bond to Mittleberger, with like consent of Scott, in the penal sum of 16,000*l.*, which recited that Merritt and Adams had carried on the business of a grist mill at St. Catharines, and had discontinued the same; and that the mill, &c., had been assigned to Mittleberger, &c., &c. (to the same effect as in deed); and the condition thereof was to pay their proportion of the

losses, or assign the said mill and premises, or such parts or proportions thereof, as would be sufficient to pay their proportions of such losses.

That Mittleberger, Benham, Merritt, Adams and Rykert executed to defendants (Tobin and Murison), a joint and several bond, dated 6th December, 1839, in the penal sum of 12,500*l.*, with a condition reciting that for the purpose of enabling Mittleberger and Benham to carry on and extend their business as merchants, Tobin and Murison had agreed to become surety by letters of credit or other collateral security, for the payment of all such drafts, &c., as Mittleberger and Benham might desire, or which might be negotiated on their account, not exceeding 25,000*l.*; and making said bond void, if Mittleberger and Benham from time to time, &c., well and truly paid, &c. all debts, &c., incurred upon or by virtue of the credit or guarantee of defendants, and also to save harmless, &c.

That an agreement was made between Merritt and Charles Mettleberger, acting on behalf of the defendants, and Mittleberger, Benham and Adams, as follows:

“Memorandum of agreement made at Toronto, between
 “ W. H. Merritt, C. Mittleberger, and John Mittleberger & Co.
 “ witnesseth, that in consideration of Messrs. Murison & Co.
 “ extending to the proprietors of the Welland Canal Mills the
 “ sum of 4,000*l.*, at 6 per cent. interest, for the term they
 “ rent the mills, and the relinquishment of their names as
 “ indorsers, except on a case of emergency, and in considera-
 “ tion of their also furnishing John Mittleberger & Co. a
 “ sufficient capital to continue their business and stock their
 “ mills, they also assign a mortgage for the same, the said
 “ W. H. Merritt agrees to give an additional security for
 “ 2,000*l.* on the premises on which he resides, on a similar
 “ security being furnished by Mr. Adams on his property, or
 “ in proportion to his interest.—Toronto, 25th January, 1840

“ Signed, W. H. MERRITT, C. MITTLEBERGER,
 “ JOHN MITTLEBERGER & Co., GEO. ADAMS.”

“The property mentioned in the letter of Jno. Mittle-
 “ berger & Co., dated 23rd December, addressed to Mr.

“ Charles Mittleberger, is also to be mortgaged to Messrs. Tobin and Murison, as collateral security, the same as the mills.

“ Signed, JOHN MITTLEBERGER.”

That in pursuance of this agreement, a mortgage dated 3rd March, 1840, (made with consent, &c. of Scott), was executed by Merritt and Adams, to the defendants, whereby, after reciting in part the deed of 28th August, 1839, to the effect that Merritt and Adams had thereby demised the mills to Mittleberger and Benham, and had agreed to endorse the business paper of Mittleberger & Co. upon the conditions, &c. therein mentioned, and that Tobin and Murison, for the purpose of facilitating the business of Mittleberger, & Co., had agreed to endorse for them to the amount of 25,000*l.*; and in order to secure Tobin and Murison for any advances they might make or liabilities they might incur on account of Mittleberger & Co., it was agreed that said premises should be conveyed to Tobin and Murison by way of mortgage; it was witnessed that Merritt did grant, &c., his three-fourth parts of said premises, and Adams did also grant his one-fourth part of said premises, with a proviso for making the same void, if Mittleberger and Benham, their executors, &c., or some or one of them, should from time to time well and truly pay or cause to be paid unto Tobin and Murison, their executors, &c., all such sum or sums of money as upon a statement of cash or other accounts between them arising or accruing under and in pursuance of such agreement should appear to be due to Tobin and Murison, and save them harmless from all damages, &c.

That in further pursuance of said agreement, Merritt (by consent of all parties concerned) by an indenture of 4th March, 1840, for 2,000*l.*, conveyed to Tobin and Murison a lot in St. Catherine's, which lot was substituted for the premises mentioned in the agreement, and had been previously sold to one Stephenson by Merritt, for 2,051*l.* 10*s.* payable, 1239*l.* with interest on 1st January, 1840, and 812*l.* 10*s.* in five annual instalments, the interest to be paid half-yearly; and Merritt, on the occasion of such sale to Stephenson, executed a bond to him dated 17th October, 1839, with a condition for

making the same void, in case Merritt, upon a payment of the purchase money and interest, executed a conveyance to Stephenson, whereupon Stephenson was admitted into possession ; and at the executing the said indenture, had not paid any part of the purchase money. All which the bill stated was well known to Tobin and Murison at the time of such execution, and that in fact it was the intention of the parties thereto, that the mortgage thereby created should be subject to such sale to Stephenson ; with a proviso for making the same void, on payment of 2,000*l.* with interest on or before the 15th July, 1842.

That in further pursuance of the agreement, Adams, by an indenture of bargain and sale, dated 24th April, 1840, in consideration of 2,000*l.*, conveyed to the defendant's certain premises in St. Catharines, with a like proviso, on payment of 2,000*l.* on the same day.

That the consideration money mentioned in such deeds was not paid, (nor any part thereof), but the conveyances were intended to secure to Tobin and Murison two specific sums of 2,000*l.* advanced by them to Mittleberger and Benham in 1839, and applied to the liquidation of certain demands due from Merritt, Adams and Scott, in relation to said demised premises, being incurred for the purpose of building the said mills.

That John Mittleberger endorsed on the counterpart of the said deed of August, 1839, the following memorandum :—
“Whereas W.H.Merritt has mortgaged to Tobin and Murison
“a certain individual property to the amount of 2,000*l.*, and
“George Adams a similar mortgage on individual property
“to a like amount of 2,000*l.*, John Mittleberger & Co. are to
“meet the interest thereon out of their concern, and carry to
“account all balances due by the proprietors of the Welland
“Canal Mills. And whereas W. H. Merritt and George
“Adams have mortgaged the mills to the said Tobin and
“Murison, to indemnify them for the repayment of certain
“advances to be made to John Mittleberger & Co., not exceed-
“in 825,000*l.*, to stock the mills for John Mittleberger & Co.,
“who are to repay the same ; W.H.Merritt and G. Adams
“are to be relieved from further indorsation except in carry-

“ing over the balances due by the mill company, as with-
 “in named, to John Mettleberger & Co. in account, until
 “the same is paid : otherwise than as above written, this
 “agreement is not varied.”

That by a certain deed, dated 23rd March, 1840, reciting that Merritt and Adams, were proprietors of “The Welland Canal Mills,” astenants in common (in the proportions already set forth) ; and that Thomas Scott was equitably entitled to one-tenth part of the same, and of the rents, &c., and was also liable to sustain a like proportion of all losses that had accrued, or might accrue in the management thereof ; and that Merritt and Adams, as such legal owners and proprietors thereof, had, with Scott’s consent, demised the same to Mittleberger and Benham for three years, and also, with like consent, had mortgaged the same to Tobin and Murison : they, the said Merritt and Adams, agreed that they would when thereto required make and execute a conveyance to Scott, of one-tenth part of the said premises, in the same proportions that Merritt and Adams held the same ; such conveyance to be subject to the said lease and mortgage, and to all leases, charges and incumbrances, theretofore made or existing, or which should thereafter at any time before the execution of the said conveyance be made upon the said premises : and further, that Merritt, Adams and Scott were, and were thereby declared to be, severally interested and entitled to the rents, business, &c., of the said mills in proportion to the estates held or to be held by them respectively ; and were also respectively bound and liable, and did thereby undertake and agree in the like proportions to sustain and bear all losses, damages, and expenses whatsoever, that should or might in any manner arise, happen or accrue in or to the said mills, or the business or management thereof ; and lastly, that the said agreement should be understood to apply to, and include all contracts, liabilities, claims, demands and transactions whatsoever then outstanding or existing, either in favour of or against the said mills or the parties thereto, arising out of the business of said mills, or on account of the said proprietors and owners thereof.

That Mittleberger and Benham carried on business under
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said deed till 15th July, 1842, when the three years limited for the same expired; and during that time sundry advances were made by the defendant to Mittleberger and Benham; the whole whereof was not applied, or intended to be applied, to the purposes of the deed of 28th August, 1839; that large remittances and payments of money and consignments of goods were made by Mittleberger and Benham to Tobin and Murison, which were carried to the general credit of Mittleberger and Benham; and at the expiration of the three years Mittleberger & Co., were indebted to defendants on account of such advances, in the sum of 80,000*l.*; which, however, was reduced by Mittleberger and Benham to 28,000*l.*

That Tobin and Murison commenced (27th June, 1843), an action of assumpsit against Merritt, Adams and Mittleberger, for 28,000*l.*, on the alleged ground that Merritt and Adams were the general partners of Mittleberger & Co., under the circumstances set forth; and at the same time commenced several actions of covenant against Adams and Merritt, upon their respective covenants in the mortgages of the 4th March and 24th April, 1840; also, actions of ejectment against the tenants in possession of the premises mentioned in said mortgages, and a suit of foreclosure against Merritt.

That by certain articles of agreement, of 8th July, 1843, and made between plaintiff and defendants by R. E. Burns, Esquire, their attorney, and assented to by J. Mittleberger, after reciting that plaintiff and defendants had agreed to an *arrangement, settlement and compromise* of the sum of 11,500*l.*, which plaintiff acknowledged to owe defendants as being the amount of his own liabilities to them, on the following terms and conditions:—1st. Plaintiff agreed and bound himself to release his equity of redemption in the St. Catharine's mill property, and then mortgaged to the defendants by plaintiff and Adams; and that plaintiff should procure a release of his wife's dower in said property; and all the machinery, &c., to be assigned to defendants, *so far as plaintiff could legally or lawfully do the same*: also, plaintiff should assign, &c., the lease then held by him from the St. Catharine's Water Power Company, under which the water was obtained to supply the said mill the consideration for said release, as agreed between

the parties, to be 5,000*l.* 2nd. Plaintiff agreed to convey, &c. to defendants, the fee simple of "The White Factory," known as "The Farnsworth Property;" the consideration therefor to be 1,000*l.*,—the release of Mrs. Merritt's dower in this property also to be procured. 3rd. The plaintiff agreed to release his equity of redemption in the property then in the occupation of E. W. Stephenson, in St. Catharine's, and procure a release of dower,—consideration therefor to be 2,000*l.* 4th. After reciting that Street held the mortgage before mentioned for 1,500*l.*, executed anterior to the mortgage to defendants, it was agreed that plaintiff should procure and deliver to defendants an undertaking from Street not to enforce the payment thereof for three years, from 1st July, 1843; and that upon payment by defendants, or their assigns, to Street, of the principal and interest, to assign over said mortgage to defendants or their assigns,—to discharge plaintiff, so far as covenants in said mortgage would render him liable;—And to provide for a further discharge of the said 11,500*l.*, it was agreed that plaintiff should assign bonds for the payment of 2,650*l.*, to defendants, which bonds were all to be good, and secured by lands being sold for the payment of the same or otherwise; and to bear interest from date and to fall due within the period of three years, from that date. The lands for which said bonds were payments should be conveyed by plaintiff to defendants, or to such person as they might appoint as trustee thereof, to convey to purchasers, on payment of their respective purchase monies and interest, the dower of Mrs. Merritt in these lands to be released; and the lands should be ample to secure the amounts due respectively thereon; the consideration for this branch of the agreement was agreed to be 2,650*l.* 5th. Plaintiff agreed and bound himself to make good the sum of 600*l.*, which had been formerly offered by Adams in an attempted compromise of his individual liability to defendants, in the following manner viz., for 300*l.*; plaintiff was to assign and transfer to defendants the former mill books, and debts, and assets thereon represented as due to the proprietors of the mill, as made out by a schedule; and giving defendants full power to use name of mill proprietors to collect the same; and in case Adams or

Scott should interfere in any way, and realease or discharge any action brought for the recovery of any of said debts, &c., then plaintiff to be answerable for, and make good the amounts so released; for the remaining 300*l.* plaintiff agreed to assign bonds secured upon lands, and transfer lands, in the same manner, with the release of dower, as agreed upon with respect to the foregoing lands and bonds,—the consideration for this branch of the agreement to be 600*l.* 6th. Plaintiff agreed and bound himself to transfer the one-half of the schooner, *Wm. H. Merritt*.—consideration for this, 250*l.* It was agreed that plaintiff should assign, &c., to defendants, all and every matter, &c., connected with or belonging to said property, or necessary or required to give Tobin and Murison the full and absolute control and ownership of the same, *so far as his rights and interests therein extended*. It was agreed that all the deeds, &c., to carry this arrangement into effect, should be completed, executed, and delivered, on or before the 1st day of August, then next.

In consideration of plaintiff's acknowledgment so to be due to Tobin and Murison the said sum of 11,500*l.*, and in consideration of satisfying the same in the manner aforesaid, and which arrangement Tobin and Murison bound themselves, and thereby agreed to accept in satisfaction and discharge of the said sum of 11,500*l.*: they did thereby acquit and discharge plaintiff of and from the said action so commenced in the Queen's Bench against plaintiff, Adams and J. Mittleberger, and of and from the suit commenced against plaintiff in this court; and from that time the same should be discontinued and cease. It was further agreed, that upon the completion of the deeds, &c., and delivery thereof, to fulfil the foregoing arrangement, defendants should execute a general release to plaintiff of all claims whatsoever upon him, except such as should arise out of the covenants, &c., contained in such deeds, &c. And it was further agreed, that the actions commenced in Q.B. against plaintiff, Adams and Scott, and against plaintiff respectively, by Mittleberger and Benham, should be discontinued, &c.; and that Mittleberger should release the same; and that Mittleberger and plaintiff, at the same time that defendants released plaintiff, should execute mutual

releases ; and for the due performance of this clause on the part of Mittleberger, defendants thereby bound themselves. It was further understood and agreed, that such settlement should not extend, nor be construed to extend, to release any claim defendants might have upon Adams for any liability he was under upon his mortgage, executed to defendants to secure 2000*l.* and interest ; nor was it to extend to release Adams from any covenant contained in the mortgage to S. Street, or the mortgage to defendants upon the mill property, but should include all claims for which Adams might be liable to defendants or to Mittleberger & Co. It was agreed that plaintiff should assign the lease of the said mills, then held by Woodward and Scott ; and that possession of the said mills and other property, should be delivered by plaintiff, *so far as he could do the same*, on completion of the deeds, &c. Lastly, it was agreed, that each party should pay and bear his and their own costs and charges theretofore incurred ; and that the expense of preparing and executing the papers, &c., on the part of plaintiff, should be borne by plaintiff, to which said articles of agreement were annexed by defendants or their agent, or with their or his consent, two lists or schedules, one being a list of the debts due to the Welland Canal Mill Company, on the 31st December, 1842, and bearing the following endorsement, namely, “The within debts to be transferred to Tobin and Murison, per agreement, dated July, 1843. W. H. Merritt to be accountable for Messrs. Adams and Scott not cancelling the same, but subject to no further costs of liability.” And the other being a list of sureties to be furnished by plaintiff in satisfaction of the sums of 2650*l.* and 300*l.*, mentioned in the agreement and headed to that effect, and containing the following memorandum subjoined, namely, “In surety for 2950*l.*, if this sum is made out of the above within three years, the residue will be restored to Mr. Merritt ; meanwhile, bonds and titles are to be made over by Mr. Merritt, according to the annexed agreement, or Mr. Merritt may reduce these sureties to the required sum of 2950*l.*, by changes of the sureties, such as will be satisfactory to Mr. Burns, according to the agreement. A letter is to be pro-

“duced, stating that properties on which the sums opposite
“the names of Blackmoor, T. Merritt and Ingersoll, are to
“be secured, are good securities for the sums named. In the
“above amounts, the interest is included to 1st January,
“1843, on such as were due.” Which said lists, headings,
endorsements and memorandum, were in the handwriting of
defendants or one of them, or of their agent duly authorised.

That in pursuance and performance of the said agreement on his part, the plaintiff caused to be prepared the several indentures, &c., contained in a certain schedule, and his wife had released her dower; and had offered to deliver them to the defendants through Mr. Burns, their agent, and had also procured from Street the undertaking before mentioned, and delivered the same to the said agent, and had also offered to deliver in the same manner the bonds duly assigned mentioned in the indenture before set forth, and that the bonds were good and secured by lands being sold, and that the lands were ample to secure the amounts due; that he had also offered to deliver the mill books. and offered, so far as he was able, to deliver to the defendants possession of the property mentioned in the said articles, and had directed the tenants thereof thenceforth to pay their rent so far as the plaintiff was interested therein to the defendants; and further, that the plaintiff performed or offered to perform his part of the said articles in all other respects.

The bill charged that the defendants, through their agent (Burns) had accepted all the said indentures, &c., with the exception of the one purporting to convey the plaintiff's equity of redemption in the premises comprised in Street's mortgage, and which they refused to accept on the ground that it conveyed only three-fourth parts of the premises, less three-fourths of one-tenth, that being Scott's property; charged further, that the defendants, or their agents, had full notice of Scott's interest in the premises at the time of the execution of the articles; also that on the 22nd of August, 1843, Burns, as the agent of the defendants, wrote to the plaintiff, requiring him to procure Mr. Street to add to a certain letter, written by Street, an undertaking to assign to such person as defendants should appoint upon payment, &c., which was done and sent

by plaintiff to Burns on the 6th of September,—that upon examining the bonds, &c., Burns, as such agent, objected to three of them; but that upon plaintiff remarking that the whole amount of such bonds by the agreement, was to be only 2,600*l.*; and the amount of those assigned was 3,300*l.*, the excess would compensate for any defects in the bonds so objected to by Burns (all the rest of said bonds having been accepted by him as such agent); he was satisfied with such suggestion of plaintiff, and waived his objections thereto and accepted the same, and all the other bonds, and thereupon handed to plaintiff a release—(said to have been afterwards signed by defendants)—and at that time it was agreed between plaintiff and Burns, that plaintiff should cause to be prepared a proper indenture for the assignment of said mill debts, which was done and forwarded to Toronto, and perused by Mr. Draper, one of plaintiff's counsel, and Burns, and accepted by Burns in the manner before mentioned. It was afterwards discovered that the lands mentioned in Reynold's bond had been conveyed to another person. Bill charged that although such was the fact, plaintiff had so conveyed by mistake, and had subsequently obtained a re-conveyance, &c.; also that Burns had transmitted a copy of the articles of 8th July, 1834, to defendants before execution, for their approval thereof; and that upon perusal and consideration thereof, defendants executed a general release from them to plaintiff, pursuant to said articles, and transmitted the same to Burns to be delivered to plaintiff in fulfilment of said agreement; and that therefore the articles were ratified. Bill further charged that negotiations have been entered into previously to the execution of said articles between plaintiff, Adams and Scott on the one side, and defendants on the other, for the settlement of the matters in dispute: and that plaintiff and Muri-son had had several interviews in relation to such negotiations, and that it was perfectly understood, that to any settlement that might be made, Adams and Scott were to be parties as well as plaintiff, and *thereby* defendants were to acquire the entire interest in the said mill premises; and that it was well known to defendants that Scott was interested in

said premises, and that plaintiff had, in fact, communicated to Murison that Scott was a partowner. That such negotiations failed, and it was afterward suggested to plaintiff by Burns, that he should make a settlement with defendants on his own individual account, apart from Adams and Scott, after which the said articles of 8th July were entered into; and that plaintiff caused to be introduced into the articles, after they had been drawn, the words, "*So far as the said W. H. Merritt can legally or lawfully do the same;*" the better to show the individual nature of such settlement, and the intention of plaintiff to deal only with what belonged to himself. That Burns led plaintiff and his legal advisers to believe that he had full authority to settle the matters in dispute between plaintiff and defendants in any manner he thought fit,—that Scott was in possession of mill premises jointly with plaintiff and Adams, and thereby Murison had notice that Scott was interested therein. That the deed of 23rd March, 1840, from plaintiff and Adams to Scott, was left with J. Mittleberger, and communicated by him to defendants; and that before execution of articles, the same was in possession of Burns. That during the negotiations, the actions brought by defendants against plaintiff were suspended, and were not further prosecuted until after the disagreement occurred respecting the form of the indenture, releasing the equity of redemption, when they were renewed; also, that Burns, as such agent, had, on the 31st August, 1845, written a letter to Mr. Boomer, of Niagara, directing in what manner the debts of the mill company should be assigned, what covenants to introduce, &c.

The prayer of the bill was, that it might be declared that plaintiff, by said articles, contracted only for the sale of his own interest in the premises; and that Burns had authority to contract therefor on behalf of defendants, in manner appearing by said articles, or that defendants recognised and confirmed the said articles, &c. If no such authority or recognition by defendants, so as to bind defendants to the full extent, then that said articles may be established, so far as Burns had authority, that articles might be specifically performed, and for injunction to stay actions, &c., &c.

Upon the facts disclosed in the amended bill, and the answer to the original bill, the plaintiff moved for a special injunction to stay trial; the court, however, granted the injunction to stay execution only. The defendant Murison, by his answer to the amended bill, denied all knowledge of Scott's interest in the mill premises before the execution of the indenture of mortgage of 3rd March, 1843; and was only informed thereof during the pendency of the negotiations for a settlement: he also denied that Burns had any authority to make the arrangement mentioned, except upon the terms of obtaining full and complete title to the mill property, and stated that plaintiff had agreed to arrange with Scott for the transfer of his one-tenth part of mill property, and therefore Burns refused to accept the release of Merritt's equity of redemption, with the clause reserving Scott's right: the same having been introduced into the conveyance after the execution thereof by plaintiff and his wife. The other material facts of the case were admitted.

Since the granting of the injunction, a verdict had been rendered in favour of defendants, in the suit against Merritt and Mittleberger for 26,014*l.* 15*s.* 7*d.*, upon which judgment had been entered.

After Murison had filed his answer and the judgment against Merritt and Mittleberger had been so entered, the defendants moved, that the injunction might be dissolved, or that the plaintiff should be directed to pay into court, the sum of 24,397*l.* 2*s.*, sworn by the defendants in their answer to be due, with interest thereon, or the sum of 26,014*l.* 15*s.* 7*d.*, being the amount of the judgment at law recovered by the defendants against Merritt and Mittleberger, with interest thereon; or that Merritt should, within fourteen days, give security for payment of said monies; or security for performance, by him, of the decree or order of the court.

The motion coming on for argument, *Blake* and *Vanhounnet* for the defendants, contended that the deed was clearly a deed of composition, and not one of compromise, and further, that according to the general doctrine laid down by courts of equity in England, the rights of a party in an action at law would never be interfered with, by injunction, without ordering

the amount of the demand when ascertained—either by a verdict or by the answer—into court, so that the plaintiff (at law) may be secured in his claim.

Amongst the cases cited for the defendants were:—Wynne v. Griffiths, 1 S. and S., 147; McKenzie v. McKenzie, 16 Ves. 372; *Ex parte Vere* 19, Ves. 93; Stapylton v. Scott, 13 Ves. 425; Dally v. Catchlowe, 4 Price, 147; Goddard v. Sloper, 9 Price, 182; Playfair v. Birmingham, &c., Railway Comp., 9 Law Jour., 255; Meux v. Smith, 7 Jurist, 825; Potts v. Butler, 1 Cox., 330; Culley v. Hickling, 2 B. C. C., 182; Thornberry v. Bevill, 1 Y. and C., N. S. 556.

Sullivan, Cameron and Esten, for the plaintiff, cited Attwood v. ———— 1 Russell, 352; Leonard v. Leonard, 2 B. and B., 171; Hill v. Buckley, 17 Ves., 394; Graham v. Oliver, 3 Beav., 124; Allan v. Inman, 7 Jurist, 433; Clewes v. Higginson, 1 V. and B. 524, 15 Ves., 516; Binks v. Lord Rokeby, 2 Swans, 222; Hayward v. Greenwood, 7 Price, 537; Boehm v. Wood, 1 J. & W., 420; Lord Ormond v. Anderson, 2 B. and B., 370; Hudson v. Bartram, 3 Madd., 440; Hearne v. Tenant, 13 Ves., 287; Halsey v. Grant, 13 Ves., 73; Seton v. Slade, 7 Ves., 264, 2 Story's Eq. Jur. sec. 776-7-8-9 and 80, and notes; Ramsbottam v. Gosden, 1 V. and B. 165; Flood v. Finlay, 2 B. and B. 9.

THE VICE CHANCELLOR.—The general rule is sufficiently clear, that wherever there is a legal demand subject to an equitable defeasance, the court will not restrain the defendant and try the equity without ordering into court the fund,—about which, at law at least, there can be no dispute; as where there has been a verdict at law, or an award for a sum of money, or where the defendant has sworn by his answer that a sum of money is due to him. The cases on this subject appear to have arisen chiefly on applications to continue injunctions already obtained. On this subject, Eden observes: “The usual mode at present is, to order the money to be paid into court, for which a reasonable time will be given, according to the greatness of the sum or the distance of the party; this, however, will not be done where there is matter confessed in the answer sufficient for a total relief.”

That there is sufficient confessed in the answer to make it

clear that total relief upon that can be given, is not pretended. The question is, whether it comes within that rule by which clear legal demands are dealt with.

In the cases relied on in support of this application, the *legality* of the demand was admitted, and the very ground of the application to equity, as the only means of relief. The present case differs in this respect, that the legality of the demand has from the beginning been denied except for a certain sum indirectly, as due from Merritt to Mittleberger & Co., the debtors of Tobin & Co., of which they could only become possessed through the circuitry of an action by Mittleberger & Co.

The debt now claimed against Merritt, as a partner with Mittleberger, has been denied, and the character of a partner repudiated. That he had in fact made himself liable within the laws relating to partnership, I am informed has lately been proved by a trial at law; with regard to the present question we can only look at the equitable relation in which the two parties had placed themselves in respect to each other, long previous to that trial.

However clear it may be, and I doubt not it is, that Merritt had, whether knowingly or not, made himself legally a partner with Mittleberger and Benham, I do not see, had this controversy been confined to a court of equity, how Tobin and Murison could have turned upon Merritt as a *partner* with Mittleberger and Benham, after dealing with him as *security* for that firm only, under an instrument, which, to me, would have appeared incompatible with the existence of a partnership, and limited the effect of Merritt's liability to the bond and mortgage. During the time of making the advances to Mittleberger and Benham, Tobin & Co. seem only to have looked to Merritt as security; and Merritt's taking upon himself such a character (had nothing further appeared in the case), would have been sufficiently explained by his desire to advance the prosperity of the tenants of his mills, raising no presumption of partnership.

Mittleberger and Benham fail; and Tobin & Co., probably on further information as to Merritt's liability as a partner, institute an action against him (it is unnecessary for present

purposes to introduce the name of Adams), for the whole amount due to them from Mittleberger and Benham. An action is also commenced against Merritt, by Mittleberger and Benham; a proceeding totally incompatible with their belief in the actual existence of any partnership between them, but which, however, proves nothing against an inference of a court of law upon premises laid before them. Merritt still denies his liability beyond the bond and mortgage given by him and received by Tobin and Murison, not as a partner with, but as surety for Mittleberger and Benham; and in this state of things—in this, then at least, doubtful state of each other's rights, an agreement is entered into “for a *settlement and compromise*,”—predicated on Merritt's liability to the extent of 11,500*l.*, acknowledged only “*on the following terms and conditions*,” &c.

Here is anything but an unconditional admission of a legal debt; or proof on the other hand of being certain to establish one. This agreement to compromise a claim then questionable, and *prima facie* *very* questionable, was in progress of being carried into effect by Merritt performing his portion of the contract: his being to convey, and theirs to receive.

For reasons which only apply to the decision of the merits of this case, the arrangement is not carried into perfect fulfilment,—each party to the contract attributing to the other the fault of the non-fulfilment. The one resumes his action at law; one part of the agreement respecting which was, that it was to be abandoned: the other applies to the Court of Chancery to restrain proceedings against the equity of the agreement. An injunction was granted not according to the application, which was to stay trial (and many cogent cases were cited to justify such a proceeding), but to stay execution. It is alleged that there is no equity confessed in the answer,—the strongest *prima facie* equity appears in the fact of the agreement to compromise; whether or not Mr. Merritt has by his neglect forfeited the right to enforce that agreement is matter for evidence; it is sufficient for the purpose of supporting his case for the present that it is not certain that he has.

It is contended that, by Merritt's own shewing he allowed such a time to elapse as deprives him of the benefit of an

agreement for a composition, on failure of any of the conditions of which, the creditor's full rights revert to him ; but it is clearly not a composition, which is the acceptance of a part in lieu of the whole of an ascertained debt, but a compromise—to avoid litigation on a doubtful claim—a proceeding which has always been favourably viewed by the courts. The compromise of a doubtful claim is held a good consideration for foregoing a possible right. See *Atwood v. —*, 1 Russell 353 ; a very strong case, in which the subsequent discovery of one of the parties' legal rights was not allowed to affect the validity of the compromise. The Master of the Rolls observes, in answer to the argument on the alleged want of consideration : “ The compromise of such a “ claim entered into with due deliberation, even if it were “ doubtful whether the claim was such as could have been “ made effectual, is a sufficient consideration, both at law and “ in equity, for such an agreement.” “ The objection for want “ of consideration for the agreement, has no more foundation “ than the objection which proceeded upon the defendant's “ alleged mistake as to his legal liability.” That Tobin and Murison's claim to the full extent, as founded on an alleged partnership between Merritt, Mittleberger, and Benham, was then at least, a matter of doubt on their part, is I think, clear from the agreement, which is with a party recognized not to be a partner ; for while they retain their rights against Mittleberger, they compromise with Merritt, and agree to give him a release in full. Now, a release of one joint debtor being a release to all, it is clear that their agreement was an undertaking not to proceed against him not as a partner ; and if there were none of the suggested obstacles in the way, it would be difficult to say that this was not a case where the enforcement of specific performance would be decreed.

The injunction was, I think, rightly granted. The agreement to compromise appeared—no legal liability was admitted as the ground of relief on account of an equitable defeasance of such legal liability, and no specific debt was sworn to. To have ordered to be paid into court a large sum stated to be due from the alleged partnership of Merritt, Mittleberger and

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Benham, would have been to prejudge the question that there was a partnership, for upon that ground only was any claim beyond the liability of surety ever set up. This question as to partnership, or no partnership, was purely a matter for a court of law; the *agreement*, which was in fact a waiver, *quoad hoc*, of the claim against Merritt in the character of a partner, presenting only this subject for inquiry to the Court of Chancery: the agreement being fair on the face of it, and entered into with due deliberation under the advice of experienced counsel—was there or not, in the conduct of Merritt, in obstructing the carrying out of such agreement, that which would induce the court to refuse a decree of specific performance. The mere fact of a subsequent action having proved the existence of a partnership, is no reason for now ordering the money to be paid into court; for the result of the cause may, by possibility, shew that the action was one which the parties had deprived themselves of the right to bring. It does not prove within the decision of *Wynne v. Griffith*, 1 Sim. and St. 147, that this ought to have been a condition on the compliance with which alone the plaintiff could have obtained his injunction.

With regard to the alleged impossibility of enforcing this agreement, from the fact that Merritt has it not in his power to comply with certain conditions contained in it, it is unnecessary, if not improper at this stage of the case, to enter minutely into the question, further than to remark that the difficulties are not so glaringly clear as to render Merritt's case hopeless. Had they been so, of course even the qualified injunction which he obtained would not have been granted.

It is *the intent* of the parties which, in all agreements, is to be carried out, if not literally yet effectually. Agreements to compromise are treated by courts with the same respect as agreements between vendor and vendee; and the rule is, that small deviations from the terms shall not vitiate a contract, where relief can be given in compensation.—*Staplyton v. Scott*, 13 Ves., 428. A party failing in doing that part of a contract which had been the *strong inducement* for the purchaser entering into it, specific performance will *not* be decreed; but when the question is simply of

more or less, and the purchase money can be reduced in proportion to the ascertained diminution of the property, it has never been held a sufficient reason for rescinding a contract that the terms cannot be complied with to the letter. —*Binks v. Lord Rokeby*, 2 Swans. 222; the case of the purchaser of an estate, described as *tithe free*. Had the estate been found subject to tithes generally, the purchaser would not have been compellable to take it, for its being tithe free, might have been his inducement to purchase; but a portion only being found so subject (in this case it was 32 acres out of 140), compensation was decreed by an abatement of the price. He had in fact a *tithe free* estate, only it amounted to 108, instead of 140 acres.

Two or three particulars are strongly relied on in the present case of deviation from the terms of the agreement when the same was to be carried into effect; as that an interest of one-tenth in certain mills, to be conveyed by Merritt to Tobin and Murison, was in fact the property of Scott; and that Merritt refused to execute the conveyance, unless Scott's share were expected from its operation; and it is stated that Merritt undertook to have this matter settled with Scott—and why this was not promptly done does not appear. But it does not necessarily follow that this was a breach of the agreement on the part of Merritt, or that he could have any object in forcing Scott as a joint tenant on Tobin and Murison. This would have been plainly inconsistent with the agreement by lessening the amount represented by those mills in the compromise, different portions of property being taken, as forming an aggregate of 11,5000*l.*; all of which were to be conveyed, of course, with all convenient promptitude. May it not be probable that Merritt might desire, on seeing the literal terms of the conveyance, which was not likely to have been drawn by his own hand, that Scott's subordinate interest in the equity of redemption of those mills, should be conveyed in a more regular manner; though it is not clear, looking at the contract between Merritt and Scott, that Merritt had not retained a right to encumber and deal with that portion of the mill property to meet the emergencies of the partner-

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ship then subsisting between Merritt and Adams, subject to consequent settlement between themselves.

Other objections were also urged, that certain bonds for land purchases which were to be assigned, were not the identical bonds specified; and that the interest in another portion of the real property to be conveyed was not the particular estate described, but one of a different nature.

Now, what was the intent of this agreement? In terms that Tobin and Murison should have certain specified portions of Merritt's property assigned to them, each portion representing a certain sum, in the whole 11,500*l.*, to compromise a disputed liability. Did the having carried into literal operation these particular items of the arrangement, form "*the strong inducement*," which led Tobin and Murison to enter into this agreement—or was it simply that various portions of the property should with all convenient speed be conveyed to them, of the full and admitted value of 11,500*l.*?

These questions may be of sufficient difficulty in Merritt's way to produce the dismissal of his bill; but they do not on the face of them bear such manifest importance; and for the purpose of this expression of opinion alone, I now refer to them, as they belong to the inquiry into the merits of the case, and not to the decision of this interlocutory motion.

Motion for payment of money into court refused, and security ordered to be given for the due performance of the articles of compromise by plaintiff, in the event of a decree to that effect being made. Costs to be costs in the cause.

[NOTE—This suit was originally commenced by Merritt and Adams; but Adams—as above stated—having died, and the suit since that time having been carried on by Merritt alone, who had always been the principal plaintiff, it was not considered necessary to introduce the name of Adams otherwise than has been done.]

REPORTS IN CHANCERY.

IN REVIEW.

FRIDAY, DECEMBER 19, 1845.

EX PARTE DETLOR.—RE DETLOR, A BANKRUPT.

Where a trader had requested one of his creditors to sue out a commission of bankruptcy against such trader, and, upon the promise of being afterwards paid his debt in full, the creditor sued out the commission, and the Judge below had refused to grant the bankrupt his certificate; upon a petition being presented to the Court of Review, on behalf of the bankrupt, against the order, refusing such certificate, the Court refused to interfere.

This was an application by petition of the bankrupt against an order of the judge of the Midland District Court (acting in bankruptcy), expressed in the following terms:

“I do order that the bankrupt’s certificate be not granted, as the commission issued at the instance of the bankrupt, and with collusion between him and the petitioning creditor.”

The evidence of collusion was, the bankrupt’s examination and the petitioning creditor’s admission before the court below. The bankrupt, in his examination, had stated that not being able to make any arrangement with his creditors, he applied to one of them, who afterwards became the petitioning creditor, to take out a commission against him: and he promised to pay the latter in full, notwithstanding his certificate; but the petitioning creditor received no further security. The latter admitted the accuracy of this statement, and that he had not sued out the commission for his own benefit. The certificate was opposed before the commissioner by some of the creditors, on several grounds, all of which, except the one set forth in the order, were overruled. A copy of all the proceedings before the court below had been returned to this court, and from these, amongst other things, it appeared that the petitioning creditor’s debt had been proved and allowed; and that the bankrupt had given up to the assignees certain assets, as being all he had.

Mowat, in support of the petition.—Such a circumstance as that on which the judge below has founded his refusal in this matter, could at no period, even in England, be taken advantage of to deprive a bankrupt of his certificate, though it con-

stituted at one time a sufficient reason for superseding a commission. That was always the settled practice in England, and not a single case or dictum can be cited to the contrary. It is only for fraud, or grossly improper conduct, that a certificate is ever refused; and there is certainly no fraud or grossly improper conduct in an insolvent trader desiring, or even actively endeavouring to have all his effects divided among his creditors fairly and equally; and then to be relieved from further liability for claims which he cannot fully discharge, and the existence of which puts it in most cases out of his power to ever fully discharge them, even when he desires to do so. Our bankrupt act, (S. 60) points out specifically the grounds which disentitle a bankrupt to his certificate, or make it void if granted; and among these are not to be found either the reason now urged, or many other reasons, which however would be abundantly sufficient for superseding a commission. The good sense of a distinction in this respect is obvious. When a commission is superseded, the bankrupt and his creditors are merely restored to the position they occupied before the commission issued. When, on the other hand, a certificate is refused, but the commission acquiesced in by all parties, the creditors retain all the bankrupt's present assets, and are entitled to all he may acquire up to the day of his death; and the bankrupt is thus forever prevented from resuming business—so harsh a punishment can never be justified but by the grossest misconduct:—now, however, the objection stated by the judge is not good, either in England or Canada, even against a commission. By the English statute 1 & 2 Will. IV, c. 56, s. 42, it is enacted, “that no commission of bankruptcy shall be superseded, &c., “by reason only that the commission, &c., has been concerted “by and between the petitioning creditor, &c., and the bankrupt, &c.” And this clause must be taken to be in force here, under the 75th section of our statute, which introduces the English law, “in all cases not otherwise provided for.” The cases cited in the judgment below, were all before 1 & 2 Will. IV., and are therefore wholly inapplicable now. Again, in Lower Canada, it is understood that the objection would not be deemed good; and how, without inconsistency and injus-

tice, can there on so important a point, be one law for Lower Canada, and another law for Upper Canada, and that under the same statute? By the insolvent debtor's act, 8 Vic. ch. 48, insolvent traders who failed before the passing of the bankrupt act, can obtain this relief from their debts, on their own direct and personal application, and though every creditor should oppose their obtaining it. And it is obvious that the provisions alluded to were introduced into that statute with the view of placing traders, who failed before the passing of the bankrupt act, in the same favourable position as that act had placed those failing afterwards; and not of placing them in a wholly different, and far more favourable position. Since the passing of this statute, the policy of the law cannot be deemed to require the slightest weight to be given to the present objection, even when urged against a commission, and not, as here against a certificate. That cannot be taken to be a crime in those whose misfortunes did not reach their crisis till after the 9th December, 1843, which, and much more than which, is expressly sanctioned and authorised in those whose insolvency took place before that time. The principal English authorities in favour of an application of this kind to the Court of Review, are *Ex parte Williamson*, 1 Atk. 82; 2 Ves. Sen. 249; *Ex parte King*, 11 Ves. 417.

Robinson, J.L. contra, on behalf of certain creditors.—It is admitted that the law is correct as stated by the other side, so far as regards the changes that have been introduced, both in England and this Province, on the subject of concerted acts of bankruptcy, and concerted commissions. Under the old cases, and down to the year 1831, there is no doubt that mere concert between the petitioning creditor and the bankrupt, would be sufficient to supersede the commission. At that period the law was so far altered, that without fraud, or the proof of some act tending to the suspicion of fraud, on the part of the bankrupt, the commission would not be invalidated. The following cases under the amended laws of bankruptcy, viz., *Ex parte Taylor*, 4 D. & C. 125; 2 M. & Ay. 36; *Exp. Edwards*, 1 M. D. & D. 8; *Exp. Caldicott*, 4 D. 264; M. & C. 600 *Exp. Lewis*, 1 M. D. & D. 365; *Exp. Clare*, 4 D. 156, clearly recognise this distinction, and state in so many words that

one must *now* look to the concert in connexion with the other circumstances of the case. In *Exp. Taylor*, 4 D. & C. p. 127, a case under the existing law, we find a commission superseded, upon the ground that the bankrupt had no property or assets to distribute among his creditors, and that his only object in getting his certificate was, to be discharged from his debts. And there can be no question, that where a promise is made by a bankrupt to a petitioning creditor, to pay his debt in full, as a consideration for his taking him through the court and procuring his certificate, (unless it were clearly shewn that no money was to be paid by the bankrupt, out of the present assets, and even this fact would hardly remove the suspicion of fraud), the certificate would be refused; now, we have no proof here upon the affidavit filed by the petitioning creditor, that Detlor, the bankrupt, had any assets; and we have an admission throughout, that Detlor had made a promise to pay the debt of the petitioning creditor, and nothing to shew that the debt has not been so paid out of the bankrupt's present property, and of course to that extent the fund diminished out of which the other creditors were to be paid. And such being the case, it is apprehended that this court will not interfere with the order made by the commissioner. The fact of there being no assets shewn, coupled with the admission of a promise to pay the petitioning creditor in full, leaves such room for suspicion of unfair dealing on the part of Mr. Detlor, that this court can hardly be expected to say that the commissioner has not exercised a wise discretion in refusing the certificate; at all events, whatever may be the opinion of the court in this respect, it seems clear that it cannot comply with the prayer of the petition, in issuing an order to the commissioner to grant the certificate. All that this court can do, it is submitted, in the exercise of its jurisdiction as a Court of Review, upon this petition, is to state its opinion upon the petition, and refer the matter back with its suggestion to the commissioner, leaving it still discretionary with him to refuse the certificate if he thinks fit.—*Chitty's Bankrupt Law*, page 341. Then as to the objection that the grounds stated by the commissioner apply to the issuing of a commission, and not to the refusal of a certificate, it is apprehended that this court

will see no good reason why the certificate should not be refused on these grounds, just as well as the commission. True it is, that in the books they are generally stated as grounds for defeating a commission, but it is nowhere laid down that they are grounds which can only affect the issuing of the commission, and must necessarily be excluded from affecting the certificate; and without an express authority of this kind, there is nothing, in common sense or reason, to allow such an objection to prevail.

Under all these circumstances, he submitted, the petition ought to be dismissed.

Mowatt, in reply.—The two grounds on which the argument against this petition rests, are, it is submitted, inaccurate in point of fact; and, if true would be unimportant. It is said there is no proof that the bankrupt had any assets at all, and no proof that he had not performed his promise to the petitioning creditor, by paying him in full out of his present assets to which his creditors were entitled under the commission. Now it was not necessary for the bankrupt to give any such proof to this court; neither objection was taken in the court below, and to avoid the necessity of going into the whole matter, the judge has, by his order, stated the sole ground on which he did refuse the certificate. The proceedings there, however, of which a copy is in evidence here, do shew that there were assets. That the petitioning creditor's debt was not paid out of the assets to which the creditors were entitled is clear, from the fact proved by these proceedings, that it has not been paid at all. It has been sworn to by the creditor, and allowed by the judge, and in this allowance all the creditors have acquiesced. The argument founded on a different state of facts, is therefore inapplicable and the cases which have been cited, it is submitted, are equally so. In all of them there was positive proof of circumstances either establishing actual fraud, or giving ground for strong suspicion of fraud. All that is even urged here is, that fraud is not disproved. In all of the cited cases, there were no assets at all to divide among the creditors; in some there were not sufficient even to pay the costs of working the commission. The bankrupts alone could by possi-

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bility receive any benefit from the commissions. And it is upon this circumstance that the judgments in them all rested. Mr. Detlor's promise to pay the petitioning creditor in full, out of subsequently acquired property, was not binding on him, and is not objectionable, such as payment would be, on account of giving undue advantage to the petitioning creditor, and could work no injury to the rest.

THE VICE-CHANCELLOR.—The petition of the bankrupt states, among other things, that he has made a full disclosure and delivery under the commission, of all his estate and effects, and in all things conformed himself to the provisions of the statute, and has so done to the satisfaction of the judge; that divers objections were made before the judge at the meetings for the allowance of his certificate, all of which, save the objection afterwards mentioned, the judge overruled; but he refused to grant the certificate; and by an order, bearing date the 24th November last, ordered that a certificate should “not be granted as the commission issued
“at the instance of the bankrupt, and with collusion between
“him and the petitioning creditor, on whose application the
“commission had been issued.” The petition prays that
“this “order may be reversed; or that it may be declared
“that the reason for refusing the said certificate was not,
“and is not, under the circumstances, a good or sufficient
“reason for refusing the same; and was not, and is not,
“sufficiently substantiated for that purpose; and that the
“said judge may be directed to grant such certificate, or to
“review his judgment in refusing the same;” and for general relief.

When this petition was first brought to my notice, though I saw no power given to this court by the bankruptcy act to interfere with regard to the certificate, except to confirm it, or to cancel it, if shewn to have been obtained by fraud; yet, as it was intimated, that the certificate had been withheld by the commissioner upon the single argument that the bankrupt had himself been instrumental to the issuing of the commission, I did entertain the petition so far as this—that the commissioner should be requested to state the ground of his refusing the certificate; not with a view of interfering with

his discretion in the matter, but that if it should appear that such objections on his part were founded purely on the force of old decisions, and I should happen to differ with him as to their applicability to the present state of the statute law, I might direct that the bankrupt should have the opportunity of laying my reasons for so differing in opinion before the commissioner in order that he might reconsider his decision. This request was instantly complied with, the only desire on the part of the commissioner and the Court of Review being to settle a uniform understanding of the law.

The reasons assigned by the commissioner are as follows:—

“Three objections have been raised to the certificate being granted in this cause; the two last are not, in my opinion, good, but the first is.

“This is clearly a case where, by agreement between the petitioning creditor and Detlor, the latter endeavours to procure his certificate with a view to get rid of old debts, some of them judgment debts; any certificate granted, would be void.

“The clause in the statute about concerted acts of bankruptcy, does not apply here; the object of it being merely to protect commissions issued when a trader has signed a declaration of insolvency, with the knowledge of the person who afterwards becomes petitioning creditor. The principle of bankruptcy is not that merely the bankrupt should be discharged from his liabilities, but that a corresponding, or at least a certain benefit should accrue to the creditors.

“There is a clause in the English statute, the same as in the Provincial, about concerted acts of bankruptcy, but still it is held that a certificate granted under circumstances similar to the present would be void.(a)

“All commissions issued at the instance of the bankrupt are void; and it is in evidence both from the petitioning creditor and the bankrupt, that the commission was issued at the request of Mr. Detlor. The fact of his promising to pay the debt of the petitioning creditor, although in itself of no importance, corroborates this fact.”

(a) Ex. p. Grant, 1 G. & J. 17; Ex. p. Brookes, Buck., 257; Ex. P. Prosser, Buck. 77; 14 Ves. 602 (ex parte Maule).

Now, had the commissioner merely returned, that he had refused the certificate because all commissions emanating from the bankrupt, in concert with the petitioning creditor, were void, and therefore, inasmuch as the commission in this case might be superseded, if any creditor took measures for that purpose, the certificate founded upon such commission ought to be withheld, I should have had no hesitation in saying that I differed with the commissioner, unless something more than that fact had appeared. The abstract law, as laid down in some of the old decisions—decisions expressly in accordance with the letter and spirit of the then existing acts of parliament—does not apply either to the letter or the spirit of the present law. In *Ex parte Grant*, 1 Gl. & J. 17, the rule is most rigidly pronounced, that a commission issued at the instance of the bankrupt, although conducted hostilely, and operating beneficially to the creditors, and although its supersedeas was in fact injurious, must nevertheless fall to the ground on account of its original taint; the law intending that every commission must be in its inception adverse to, and not for the convenience of the debtor; yet even under that state of the law, the Vice-Chancellor evidently yielded to the authority of decisions; rather than to his own conviction of what the expediency and good sense of the case required.

I say that if the objection of the commissioner had avowedly rested on this ground alone, I should have gone so far as to express an opinion that the rigid rule in *Ex parte Grant*, is now in a great measure obsolete; and that it is not under the present law a sufficient objection to the carrying out of a commission, and granting a certificate thereupon, that it shall have been proved that the bankrupt not only co-operated in, but was the instigator of the issuing of the commission, providing it is not for his ends alone that the proceeding be taken. On looking into the present case, no mere arbitrary acting upon any abstract opinion in accordance with the old law appears on the part of the commissioner, but a decision within the recent cases decided on the improved state of the statute law of England, which in all its essentials has been adopted here.

It appears from the proceedings, that not only was the

commission obtained at the instance of the bankrupt, and under a promise to pay the debt of the petitioning creditor (which in itself, unless viewed as a sort of bribe to the petitioning creditor, is not much, as he has a right to pay any creditor, out of property acquired after a certificate fairly obtained), but there are facts apparent which may easily be supposed to have convinced the commissioner, who had opportunities of seeing into the heart of this case, which I have not, and thus coming to a conclusion on better grounds than I can pretend to, that this was a commission concocted for the benefit of the bankrupt, in relieving him from his debts, and not for such relief *combined with the equal and beneficial distribution of his assets among his creditors*. Had this latter ingredient appeared prominent, there is no reason to believe the commissioner would have looked exclusively at the former. The disallowance of the certificate is not the mere arbitrary act of the commissioner. It is opposed by those whose claims to a large amount are not impeached as *bona fide* creditors; while there is something equivocal in the fact, that among the debts proved by apparently friendly creditors, are claims of such ancient standing, that in some the interest now exceeds the principal in amount. I think it more than probable, therefore, even from what appears before me, that the commissioner was justified in the present exercise of his discretion, even supposing the Court of Review had clearly on such a matter the right to control his judgment.

The decisions I allude to, are cases in the Court of Review, which merely by substituting "commissioner," (and consequently *certificate*) for "fiat," are precisely in point in principle; and whether they apply in fact to the present case, it is for the commissioner to decide.—*Ex parte Clare, Re Glover*.

Sir George Rose, after remarking that under the existing law a fiat could not be annulled for concert alone, adds, "But then we may look to the concert, in connection with other circumstances of the case. Neither am I disposed to dispute the proposition, that any creditor may properly take out a fiat to defeat an execution; *but then it must not be the bankrupt's fiat.*"

In *Ex parte Taylor*, 4 Deacon & Chitty, 127, Sir George
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Rose observes, "where a bankrupt has *no* property, and the "petitioning creditor, well knowing the fact, issues a fiat "against him, not for the purpose, of course, of any dis- "tribution of property, but for the purpose of enabling the "bankrupt to obtain his certificate, and get discharged from "his debts without paying one farthing in the pound; in that "case, it is impossible to deny that the fiat is void on the "ground of fraudulent concert; for in order to render a fiat "good which has issued against a trader who has no property, "it ought, at least, to appear in evidence that there was some "prospect of property to be got from issuing the fiat. *The "question here is, whether besides the concert there is fraud.*"

MONDAY, 15TH DECEMBER, 1845.

BOWN V. WEST.

INDIAN RIGHTS—RECISSION OF CONTRACT—COMPENSATION.

A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand River, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands: Held, that as the whole estate, both legal and equitable, was in the Crown, it was not a case in which the Court would interfere, even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to be dismissed with costs.

The bill filed in this cause stated that in the early part of the month of September, 1843, the defendant, "*pretending to have, and representing himself as having a leasehold "or some valuable and transferable estate or interest of and "in the parcel or tract of land and premises hereinafter particularly described, and as being entitled to the possession, "and as being in fact in possession thereof, agreed with the "plaintiff to sell him, and the plaintiff agreed to purchase for "the sum of 265*l.*, all the said estate, right, title, interest and "possession of him, the said defendant, of and in the said "parcel or tract of land and premises; which said parcel or "tract of land and premises consists of about 134 acres, where- "of about 70 acres are cleared and improved, in the vicinity "of the town of Brantford,*" being &c., and described, &c.

That the treaty for the sale was carried on by plaintiff's

agent. That plaintiff had paid 112*l.* 10*s.*, and given a note of hand for the balance of the purchase money agreed upon.

That after execution of assignment, and the delivery of the title deeds, &c., to plaintiff, and a notice to the tenant of defendant to pay rents to plaintiff, plaintiff's agent had gone to the premises with the defendant, and found them to agree in quantity and extent of improvements with the representations made by defendant, and was put in possession of a tavern on the premises, and believed such partial possession was given as and for possession of the whole parcel of 134 acres; and it was not till some days afterwards that plaintiff, for the first time, learned from the person in possession of the tavern, that the defendant had not been entitled to the possession of the whole tract of 134, *but had a valuable and assignable interest in 30 acres only*, or thereabouts, and had in fact been in possession of that quantity only,—which information he found upon enquiry to be correct, and thereupon saw defendant, and proposed to rescind the contract, &c., which defendant refused to accede to: but it was afterwards verbally agreed between plaintiff and defendant, that plaintiff should retain possession of the tavern and thirty acres of land, of which he was in possession, with liberty for defendant at any time within two years to repay the sum of 112*l.* 10*s.*, and re-possess himself of lands, &c.; and that defendant should forthwith deliver up the note given by the plaintiff for the balance of the purchase money; but if the defendant should fail to repay the said sum of 112*l.* 10*s.* within the period of two years, that then the plaintiff should retain possession of the said premises without further consideration beyond that sum.

That defendant had refused to give up the note without a bond from plaintiff for the due performance of his part of the agreement; which plaintiff went and had prepared accordingly; but on his return with the bond, he found the defendant had gone away, and from that time further negotiation ceased. That the sum of 112*l.* 10*s.*, paid by plaintiff, on account of purchase money, was more than the portion of the premises which plaintiff had been put in possession of was worth.—*To be continued.*

THE
UPPER CANADA JURIST.

IN CHANCERY.

(IN REVIEW).

MONDAY, 15TH DECEMBER, 1845.

BOWN V. WEST.

(Continued from page 288.)

The bill charged that the defendant had commenced an action against plaintiff for recovery of the amount of note—that defendant, at the time of entering into the agreement, knew that he had not any valuable or assignable interest in the whole tract of 134 acres, and that he had not in fact, nor was he entitled to have the possession of a greater portion thereof than 30 acres, or thereabouts; and that the defendant had induced plaintiff to enter into the agreement by misrepresentation or suppression of the truth and matters within his knowledge.

And plaintiff submitted that he was entitled at his election to have the contract wholly rescinded, or carried into effect, so far as defendant could do so, with abatement of purchase-money, &c.; and prayed that the contract might be rescinded, and defendant ordered to deliver up the promissory note of plaintiff, and pay all costs, &c., incurred by plaintiff in respect of the contract and the action at law. Or, if plaintiff should elect to have the contract carried into effect, so far as defendant could execute it, then a reference to the master to enquire what compensation plaintiff is entitled to, in respect of the difference in quantity between the parcel of land comprised in the agreement and the portion

thereof in which plaintiff had actually acquired an interest from defendant; and if it should appear upon such enquiry that the defendant had received more than the value of the interest and possession so acquired by the plaintiff, then that defendant might be ordered to repay such excess, the plaintiff offering to pay such further sum, in addition to the sum of 112*l.* 10*s.*, as might appear just. That the defendant might be ordered to deliver up the note of hand given by plaintiff, and for injunction, &c.

The defendant by his answer set forth, that about the year 1843, one W. Parker was in possession of 15 or 20 acres cleared and improved land near Brantford, (part of Indian tract), with a house thereon. And about that time defendant entered into treaty with Parker for the purchase of his right to the said dwelling-house and parcel of land, who produced to defendant in course of such treaty, as evidence of his title, certain instruments in writing, signed by one Isaac Duncombe, one of the Six Nations Indians, resident on the Grand River tract, whereby Duncombe conveyed, or assumed to convey to Parker, for a valuable consideration, all his (Duncombe's) *right, interest and possession* to the said dwelling-house and the land thereto adjoining, containing 134 acres, more or less, as Surveyed by Lewis Burwell, Esquire, D. P. S., including the improved land adjoining the house, and was the same as mentioned in the bill.

That defendant then understood and believed that by taking an assignment from Parker to himself of the said instruments of conveyance, and entering into actual possession of the said dwelling-house and the clear land adjoining, (he the defendant) would acquire a right to keep possession not only of the dwelling-house and cleared land, but also a right to enter on the remainder of the said tract of 134 acres, and take actual possession thereof, by clearing and fencing it. And under such impression, and being satisfied with Parker's title, defendant purchased his interest in the premises for 125*l.*, and took an assignment in writing of the said instruments of conveyance, and was put into possession of the dwelling-house and cleared land adjoining thereto, and so remained in possession until the sale to the agent of plaintiff; and while so in possession, defendant cleared and improved about 15 or

20 acres more of the said surveyed tract of 134 acres, and fenced the whole clearing of about 35 acres, and built thereon a tavern and out-houses.

That in September, plaintiff and Robert R. Bown (the agent of plaintiff), waited on defendant, and offered him \$1000 for the premises aforesaid ; which offer was declined by defendant ; but afterwards on the same day he left word at residence of said R. R. Bown, that he would take \$1100. Next day, R. R. Bown, stated to defendant that he would give \$1060 in cash, if defendant would give possession on the morrow. That defendant had taken the writings, including the conveyance from Duncombe to Parker and the assignment thereof to defendant, and exhibited them to R. R. Bown, who examined them and expressed himself satisfied therewith. That during the treaty for sale, and before the completion thereof, defendant had observed to R. R. Bown, that he supposed he (Bown) was aware of the nature of Indian lands ; and that Bown had replied he knew all about it as well as he (defendant) did, and that defendant had stated that he would put him in possession of that part of the premises that was under fence, and the buildings ; but for the woods, meaning all the rest of the said tract, Bown must look out for himself, who expressed himself fully content on that behalf to rely on the said papers of defendant. That thereupon an assignment was drawn up and executed, and part of purchase money paid, and note of hand given for the balance.

The next day defendant had gone to the premises with R. R. Bown, and took him over the tavern, out-houses and cleared land thereto adjoining, and gave him possession thereof, being under fence, and containing about 35 acres, and then told the said R. R. Bown that what was under defendant's fence, meaning the said 35 acres, he gave him possession of, but as to the rest of the said tract of 134 acres he (Bown) must look out for himself, and that defendant knew nothing of it : and that Bown replied, that he knew that.

That before leaving the premises defendant had stated to plaintiff that he had sold the place, meaning the premises, too cheap ; and offered Bown to return the note of hand, if he would give defendant four years to repay the amount

of cash (112*l.* 10*s.*) paid to defendant, and defendant would allow him (Bown) to hold the premises in security; to which Bown replied that he never made "children's bargains." Defendant denied having agreed to rescind the contract as in the bill stated.

That about two months after the completion of the sale, R. R. Bown had stated to defendant that he (Bown) could not hold as much land as the lease specified; to which defendant replied, that he could not help it, that he had sold it for better or worse, as it was, and that he had not sold any land, but only the right defendant had under the papers; that R. R. Bown then expressed his readiness to accept the offer formerly made by defendant to rescind the bargain, &c., but defendant declined to accede thereto, as Bown had not accepted such offer at the time, &c. That the premises in the actual possession of plaintiff, were worth the full amount agreed upon (265*l.*). The answer also denied all knowledge by defendant of the badness of his title, and all misrepresentation, &c.

R. R. Bown, and some of the members of his family who had been examined as witnesses on the part of the plaintiff, stated in their depositions, that at the time of making the bargain respecting the sale of the premises in question, defendant represented that he had about 130 acres, about 70 of which were cleared, and had produced a map of the premises in question.

R. R. Bown also stated, in his evidence, that before the note became due, he had accompanied defendant to the land to take possession in the name of plaintiff, and walked around the boundaries with defendant: that he then thought part of the land on which defendant took him, was not his, and for the first time he found he had been deceived by defendant; that part of the land on which he had been taken, was improved land, and ascertained afterwards that it was not the property of defendant; that defendant, in offering to sell, did not pretend to sell the fee-simple, but merely the right he had under his deeds to Indian lands; *that he never had any conversation with Mr. Burwell respecting the purchase from defendant; that when defendant put him in possession of the premises, he did*

not give him possession of 30 acres alone, informing him that he must look out for himself for the rest, nor did the witness reply that he knew it; that defendant, at the time, professed to give possession of land which was found to belong to another person; that defendant never made the proposition for rescinding the bargain and repaying the purchase-money in four years, the only proposition to that effect was made by witness, and that he had never made use of the expression, "he never made children's bargains;" and that after a document (in evidence) for the purpose of rescinding the contract had been prepared by Mr. Lewis Burwell, according to the mutual agreement of all parties, defendant refused to sign it.

Other witnesses proved that defendant had stated that he had sold his right or interest in 134 acres to plaintiff; that defendant had never lived on the premises; that upon being told that plaintiff had said that defendant had only 30 acres, defendant answered that he had only sold his right to the land in question; that defendant had said that there was not the quantity of land he had proposed to sell.

On the part of the defendant, Mr. Lewis Burwell stated he had surveyed the premises in question, and the value of them, if held in fee-simple, would be above 500*l.*; that defendant, so far as he knew, had never been in possession of the whole tract, but only of 33 or 34 acres—the remainder, for the last 20 or 30 years, had been in possession of one Tuttle and his representatives. Tuttle's possession was held under a lease from a number of the chiefs and others of the Six Nations Indians. That about the time of the execution of the assignment to plaintiff, R. R. Bown had gone to witness's office, and employed him to draw up a paper between the parties to this suit—could not recollect whether such paper was prepared at the time—but R. R. Bown told witness that he was about to purchase in the name of his son (the plaintiff), the possession of the defendant of the said premises; and that witness then told him that defendant could not sell more than 33 or 34 acres, and that the remainder was in the possession of Mrs. Patterson, formerly Mrs. Tuttle, and one Johnson; that witness told him that defendant had had a trial before the magistrates with Mrs. Patterson and her husband, for an alleged trespass in respect

of the premises, in which defendant had failed, the former having established their possession; and stated to him that Wm. Parker had been deceived in purchasing originally from the Indian, Duncan, and advised Bown to take an assignment of what defendant had in his possession; to which Bown answered, that the defendant had made him acquainted with the circumstances, as stated to him by witness, and that he was only purchasing the quantity that he was in the actual possession of, but would take an assignment of his interest in all that Parker's lease covered, and perhaps he might be able to get it; and that he considered the part he was purchasing and getting possession of, was worth the money he was paying for it, as it lay so near the town of Brantford. That on a subsequent occasion, about the 18th or 19th September, 1843, R. R. Bown stated to witness that he wished an alteration in the contract with defendant, and employed witness to draw up an instrument for that purpose; and that he had subsequently, at the request of the plaintiff, made a survey of the lands in question, the object of the plaintiff being to ascertain the precise quantity of land the defendant had put him in possession of, and desired the plan also to embrace the lines contained in lease from Davis or Duncan (the Indian), to Parker.

Abram Bradley.—Owns the farm adjoining the premises in question. In selling Indian lands, a quit claim deed of the right of the seller is usually given—such seller being in possession of the land, and entitled, or supposee to be entitled, to a right of pre-emption,—leases were often made to embrace more land than was under improvement, *but not more than the seller claimed*. Defendant was in actual possession of about 34 acres, with buildings, &c. Witness had conveyed to defendant, and informed him at the time of doing so, that the person who had conveyed to witness, he (witness) had been told, had conveyed only 34 acres. Witness knew nothing of the possession or claim of any one to any other part of the 134 acres. R. R. Bown had been engaged in purchasing Indian properties—had bought three. Witness, when he held the deeds of the premises in question, had told R. R. Bown that he owned them and the farm adjoining, and that witness had 80 acres in the farm, and 34 in the premises in

question—had pointed out to R. R. Bown the line fence between the premises in question, and those of one Pater-son. Annual value of the 34 acres and buildings, about 36*l*.

At the hearing of the cause, the counsel for the plaintiff submitted, there could be no doubt that the bill asserts that the defendant professed to sell the right of possession of one hundred and thirty-four acres, or thereabouts, and there is no principle clearer than that the plaintiff had a right to that possession ; no matter if it were only a possession at will, still for that possession he had bargained with the defendant, and was entitled to obtain it. Had the contract been concerning the sale of a fee simple, the authorities are clear to the point, that if the vendor is aware of any material defect in his title, and conceals such defect from the vendee, the latter will not be held to the sale ; and a party purchasing only the possession, would also be entitled to come to this court to rescind a contract concerning the sale of such possession, on the ground of such fraudulent concealment ; in the present case there can be no doubt of such concealment, for the defendant himself has not even denied, but shews clearly, that he concealed the defective nature of his title. The only question for enquiry being, whether or not the defendant was aware of such defect in his title at the time of entering into the contract, on this point the evidence given by Mr. Burdwell is clear to show, not only that defendant never had had possession of what he professed to sell the plaintiff, but also, that in certain proceedings which had been had against West, the right of Patterson to certain portions of the premises had been established.—Citing *Besant v. Richards*, Tam. 509 ; *Winch v. Winchester*, 1 V. & B. 375 ; *Partridge v. Usborn*. 5 Russel, 195 ; *Edwards v. McClay*, Cooper, 308 ; *Dobell v. Stevens*, 3 B. & C. 625 ; *Hill v. Bulkley*, 17 Ves. 394 ; *Balmanno v. Lumley*, 1 V. & B. 224 ; *Milligan v. Cooke* 16 Ves. 1.

For the defendant, it was contended that the bill did not state, nor did the evidence shew with any precision, in what respect the title of the defendant was defective.

The statement in the bill was too vague and general, it should have set forth the custom of the Indians to sell

certain portions of the lands set apart for their use, which the crown, of its mere grace and favour, had been in the habit of recognising, and granting a patent of the lands so sold to parties holding the conveyances from the Indians.

There is nothing shown, either in the bill, answer, or depositions, upon which the court can found any decree.

The bill also calls upon the court to make abatement, on the ground, that the plaintiff has not possession of the whole of the premises in question; but it does not appear that the plaintiff here has not a right to apply to the government for a grant of the whole tract originally conveyed by Duncombe, and the court will not presume that such right would not be recognized by the crown. The instrument (*a*) which the defendant had executed, itself shows that the possession was not what was agreed to be sold, but it was intended merely to assign the leases under which the defendant claimed, and all interest that he held in the lands under such leases.

The statements made by the bill are not supported by the evidence; there is no absence of the land mentioned and described in the several assignments, the title is admitted by the bill to be good for thirty-four acres, and there is nothing stated in the bill to shew that any other person had a better right than the defendant to the remainder, nor is any person shown to be in possession. The plaintiff and his agents both resided near the premises, and must have been aware if any person had been in possession of the rest of the tract, and he also knew that defendant had a claim to the whole; that claim he had purchased, and such as it was, it had been assigned to him. There could not, therefore, have been any misrepresentation, made by the defendant, and if any had been made, it was clear that the plaintiff could not have been prejudiced thereby, for the evidence shows that it had been previously mentioned to the agent of plaintiff.—Citing *E. India Compy. v. Henchman*, 1 Ves. Jr. 287; *Cressett v. Mytton*, 1 Ves. Jr. 449; *Serjeant Maynard's case*, 1 Sug. 555, 8, 9, 62 & 3 (9th Ed.); *Early v. Garrett*, 4 M. & R. 687; *Thomas v. Powell*, 2 Cox., 394; *Cann v. Cann*, 3 Sim. 447; *Bree v. Holbeck*.

(a) Set out in the judgment of the court.

Doug. 654, Free. 2; But. note 1, Co. Litt. 34. a.; Cator v. Lord Bolingbroke, 1 B. C. C. 301, 2 ib. 282.

Blake and Brough, for plaintiff.

Sullivan and Esten, for defendant.

Tuesday, 13th January, 1846.

THE VICE-CHANCELLOR.—This is a bill to rescind a contract for sale; or to decree compensation by an abatement of price proportioned to the difference in the quantity of land comprised in the agreement, and the portion in which the plaintiff considers that he has actually acquired an interest.

Among some conflicting evidence which, according to my view of the law, it is not important to sift or decide upon, the main facts of the case I take to be as follows :

On the 10th of March, 1834, a sale is made from Isaac Davids alias Isaac Duncan, an Indian of the Mohawk tribe, in consideration of 50*l.* to one William Parker, of “all and “singular certain improvements and buildings lying and “being situate on a certain parcel or tract of land which is “composed of part of the Indian territory on the Grand “River, bounded as follows, &c., containing one hundred and “thirty-four acres;” with the form of a covenant, “that he “the said Davids is the true, lawful and rightful owner of “all and singular the said improvements and buildings, according to the custom of the said Six Nations Indians in “apportioning and settling the lands amongst each other.”

After various assignments of the right, whatever it may be, to these improvements, it vests in the defendant Alder Baker West. What improvements existed at the time of the sale from the Indian, does not appear: but at the commencement of the suit, somewhere about 34 acres had been cleared and fenced, partly by the defendant, and a tavern built upon the land on the road between Brantford and Hamilton.

The next important document, dated 11th September, 1843, is as follows: “Know all men by these presents, that I, Alder “Baker West, of the town of Brantford, &c., blacksmith, for “and in consideration of the sum of £265 of &c.. to me in “hand paid by John Young Bown of the same place gentleman, the receipt &c., hath granted, sold, assigned and set “over to him the [said] John Young Bown, his heirs and “assigns, all and singular my right, title, claim, possession

“ and demand whatsoever, in and to the annexed assignment
“ or quit claim from John McDonald to [*the said*] Abram
“ Bradley, and from the said Abram Bradley to the said Alder
“ Baker West, and to have and to hold the same unto the said
“ John Young Bown, his heirs and assigns, &c.”

Together with this, all the previous transfers, each assigning the rights supposed to attach to its predecessor, were handed over to the plaintiff. Part of the purchase money was paid, and a note given for the remainder.

After somewhat hastily, as it might seem, concluding this transaction, the plaintiff examined the land described in the instrument from the Indian, and had reason to believe that the amount which he states that the defendant represented himself to be in possession of, was not near so much as he had stated. Indeed it is not pretended that the portion fenced and cultivated in the visible possession of the defendant or his tenant, much exceeded thirty-four acres; the rest was in a great measure forest land undivided by enclosures. He discovered, it appears, that there was some conflicting claim to a portion at least of the enclosed lands, originating in a similar source from which sprung that of the defendant. As to what these claims are, or to what extent, or how indicated on the land, we have no evidence whatever, except from one of the defendant's witnesses, Mr. Lewis Burwell, who states that the portion not cleared and possessed by the defendant, had long been in the possession of Stephen Tuttle and his representatives. He says, “ Tuttle's possession was, I believe, under a lease
“ from a number of the chiefs and others of the Six Na-
“ tions Indians.” What Mr. Burwell meant by possession, does not appear. On the small plan drawn by him, and referred to in the evidence for the plaintiff, the name “ Tuttle ” is inscribed on land adjoining, but forming no portion of this irregular block of 134 acres.

On this the plaintiff, after some unsuccessful negotiation with the defendant, files his bill for relief in this court.

If the bill itself were alone to be viewed as the statement of an alleged case of equity, it would present this state of facts only: That one party sells, and the other purchases the right to the possession of Indian, that is of Crown Lands,

such right of possession never having been out of the Crown, but specially appropriated to the use of the Six Nations Indians, under the proclamation of Governor Haldimand. The nature of this tenure by the Indians, and their incapacity either collectively or individually to alienate or confer title to any portions of such lands, might have been sufficiently plain, even though the point had not been raised in *Doe Jackson v. Wilkes*,^(a) and the whole matter maturely and lucidly considered and decided on by the Court of King's Bench.

There is one fact, however, which if it had been stated in the bill, and the present averment in the bill proved, would have shewn that the plaintiff might have had a sort of possible contingent title to the land in question, supposing the defendant's rights had been such as he contracted to sell; which is, that in settling the lands of the Indians, surrendered by them to the Crown for sale and settlement for their express benefit—using the word *surrender* merely as meaning that their express concurrence is in such case given, and that the alienations by the Crown are not against the faith of Governor Haldimand's proclamation—where in many cases, (putting the Brant Leases out of the question), individual Indians had assumed separate apportionments of these lands, and made improvements, and then sold them, the purchasers have, where the transactions bore evidence of bona fides, been generally preferred in some cases I believe even to the extent of having free grants; the Indians themselves in these cases having by their custom sanctioned such alienations, being compelled to do equity. This practice, however, is the exception; the general rule having been to consider sales of lands or exclusive local rights by Individual Indians, as a fraud upon the whole body, for whose use it was set apart.

This custom or equitable practice in the Crown Land Department, however, has not been alluded to in the bill; neither is it attempted to be shewn what is “the custom of “the Six Nations Indians, in apportioning and settling their “lands among each other,” as referred to in the instrument

(a) Easter Term, 5 Wm. IV.

which forms the ground-work of this claim; and it is only on knowledge dehors the pleadings, that we can understand any thing like an approach to a right to the land in question. But for the benefit of the plaintiff I choose to allude to the fact as within my own knowledge instead of binding him down to the uncertainty of his bill. On the face of it there appears simply a case of parties calling upon the court to deal with a contract affecting property, on both hands confessedly belonging to a third party, and assumed by them without that party's consent or concurrence—merely self-constituted rights—the real owner a stranger to the transaction. Had it been competent to a party joining in such an agreement, to say that his own act was not a contract, and that the bargain in which he was concerned was one which could not be supported in equity, the bill would have been demurrable; but as he cannot demur, it is for the court to do it, if it sees clearly that it ought not to entertain jurisdiction in the matter. If this be a contract such as a court of equity can deal with it at all, it must be reciprocal, one which it can enforce as well as rescind. But how could the court enforce such a contract as this, and (supposing the alleged counter claims or rights of other lessees out of the question) decree that the defendant shall put the plaintiff in *possession* of the excess of 134 acres of Crown lands beyond the 34 of which he is, as was the defendant before him, in the visible possession and occupation? I cannot comprehend how any possession of the unsurveyed lands of the Crown can be had even by implication, except by the actual clearing, fencing or cultivation of a particular spot, which to strangers would afford a presumption of the right of possession. But the court can never decree possession to be given of property which each party has admitted and shewn belonged to neither.

It does not appear clear that, beyond the 34 acres in the visible possession of the defendant, any part of the 134 acres (the *improvements* upon which, not the *land*, were assigned by the Indian Davids or Duncan,) has ever been enclosed or cultivated; or that there is any tangible or manifest possession in the person or persons alleged but not proved to have claims thereto, inconsistent with those assigned by the defendant to the plaintiff, nor is the nature of these sug-

gested claims set forth: nor, assuming that they were such as the Crown would entertain, whether they were anterior, or in any respect paramount to those of the defendant at the time of the assignment. The objection is taken chiefly from Mr. Burwell's evidence that the defendant was not in possession of the whole, but that one Tuttle or his representatives had certain anomalous claims or rights such as those relied on by the defendant: but as already remarked, no evidence is produced that there was any visible possession known to the defendant, and such as might have put the purchaser even of such a claim as this upon his guard, had he taken common precaution.

Giving then the benefit to the plaintiff of having stated in his bill the custom of the Indians and practice of the Crown in its land-granting department, by which peculiar favour has been in certain cases shown to purchasers of Indian rights by free grants or privilege of pre-emption, it does not appear that the plaintiff ever tested the goodness of the claim he had purchased, by applying for the recognition of it by the Crown, and for a grant of land upon any conditions;—for however weak his title is, there is no proof that any but the Crown has a better. He knew that he was purchasing that which could only be valuable on the contingency of the Crown confirming it, and yet he himself obstructs the happening of that contingency. It may turn out to be that the assignment from Davis or Duncan of his improvements, however small they may have been compared with the tract of land they profess to carry with them, may be favourably viewed by the Crown, and the claims stated to be in conflict with it not so; in which case it will probably be a very beneficial purchase, for its value if confirmed by grant, is stated to be very much beyond what was to be paid for the right such as it exists.

In the absence of direct decisions, and referring to first principles and a supposed analogy to English decisions on questions of Tenant right, I did entertain jurisdiction in the case of *Jeffrey v. Boulton*, in dealing with equities arising between parties in relation to claims to property, the absolute right to which was still in the Crown. But that it was a very different case from the present. There

the possession had for a long period been by its own act out of the crown, first under a lease, and then under a contract for sale and payment accepted; a contract it is true not enforceable, for it is a legal impossibility that the Crown can violate its contract. It appeared to me that under such a partial or inchoate alienation of Crown lands, there might arise tangible rights between parties interested in such lands that would be recognized by the Court of Chancery, and enforced *inter se*, though the patent had not yet issued from the Crown. The Court of Appeal however thought otherwise: and probably by their decision have prevented the court from straying beyond the legal landmarks to grasp at moral subtleties. In the present case there is no recognized possession out of the Crown, except the occupation of the Indians, who cannot alienate; and as no equitable title can be discussed, except as between the equitable and at least *apparent* legal owner; and as in this case the legal owner is the Queen, I cannot settle claims affecting her lands between parties who are in a manner co-trespassers, or make any decree upon this bill.

The second alternative of the prayer of course falls to the ground. If the contract cannot be enforced or rescinded in the whole, it cannot be enforced or rescinded in part.

Notwithstanding my unwillingness to assume jurisdiction in this case, in relation to the subject matter of the suit, I should have no hesitation in so doing as regards costs, had those charges been well substantiated which impute fraud and misrepresentation to the defendant; as to the nature of the property, or rather the chance of acquiring property, sold, I do not see clear evidence of such fraud. He is charged with selling "a transferable interest," whereas he had not in fact any such interest. Such interest as he had, was apparent upon the face of the papers, and was clearly understood by the plaintiff; even setting aside that part of Mr. Burwell's testimony which shews that he cautioned him with regard to the defendant's questionable claim to any part of the 134 acres, except the portion which he had in his manifest possession and occupation. That this claim had been treated as a transferable interest is clear, for it had not only passed through several hands, but had actually been sold at

sheriff's sale under an execution. The instrument of sale itself already quoted, drawn by the plaintiff, only professes to convey the defendant's right, not to the land, but to *the several quit-claims*, on the evidence of which there rested the hope of acquiring the land. He must be intended therefore, were there not direct evidence of the fact, thoroughly to have understood the nature of the right he was purchasing. The defendant is a man in a humble sphere of life, and there appears no reason to doubt, believed in the efficacy of the evidences of title he was assigning: the plaintiff, a man in a superior grade, from his intelligence perfectly aware of the nature of the right he was purchasing properly called, "an Indian title,"—his agent and relative residing near the spot, with abundant facilities before entering into the bargain of ascertaining facts of which complaint is now made of concealment and misrepresentation,—buying too at a low price when compared to the value of the land itself, from which may be inferred, that the purchase was not unencumbered with difficulties. There is no reason to doubt that the defendant thought he was selling him all he professed to do, and if it be found that obstacles exist to the plaintiff's urging his claim upon the Crown, I do not see that they arose or were concealed by the fraud of the defendant. This question has relation only to costs. If fraud were to be inferred, I could only have dismissed the cause generally—but as it is, I think the defendant has been erroneously brought before the court, and must be released with his costs.

Bill dismissed with costs.

SATURDAY, 15TH DECEMBER, 1845.

WRIGHT V. HENDERSON.

EVIDENCE—PLEADING:—Where a party filed a bill to set aside a deed on the ground of fraud. Held, that evidence of particular acts of fraud, although not charged in the bill, was admissible.

And where a part of the consideration for the deed sought to be set aside, was a promise on the part of the grantee to make a lease for life of certain lands to the grantor, the bill prayed a specific performance thereof, and the defendant without making discovery of the circumstances pleaded to so much of the bill generally, that there was not any contract. Held that a plea in that form, intended as a plea of the statute of frauds, was insufficient.

The bill filed in this case was for the rescission of a deed obtained, as alleged by the bill, under circumstances of fraud and misrepresentation. [The nature of which is set forth in the judgment of the court.]

The defendant, by his answer, admitted the execution of the conveyance by the plaintiff, in the manner set forth in the bill, but denied any fraud, &c., in obtaining it. And as to so much of the said bill as seeks to have any discovery of all and any or either of the deeds, &c., touching the premises in the township of York, or seeks a discovery of defendant's interest, &c., therein, "He doth plead thereto; and for plea saith he did not at any time promise the said complainant that he would give complainant a lease for life, or any other term, of fifty acres of land, or of any land in the said township of York, with the improvements thereon, &c., all which matters and things this defendant doth aver to be true, and pleads the same to so much of the said bill as is hereinbefore pleaded to, and humbly prays the judgment of the court, whether he ought to make any further answer to so much of the said bill as is hereinbefore pleaded to."

One of the witnesses called on the part of the plaintiff,—Thomas Burnett—in his depositions stated that, "*In July, a year ago, [1843] the defendant asked me to take over to the United States a deed of 400 acres of land in the township of York, to get it executed by someone, any person whomsoever I could get to sign it as a lawful heir. He took me upon the land, and shewed it to me. I do not remember the number of the lots. Defendant promised me £20 if I should go; he told me the*

“ name of the heir or heiress, it was——McDonald ; he
 “ wished me, after getting some one to execute the deed, to
 “ testify to the execution, in order that he might sell the
 “ land ;” the witness refused to go, did not know of defendant
 having ever been in possession; he had told witness he wished
 to get possession, and witness knew two persons were in pos-
 session of part of the land. Defendant told him the real heir
 lived in a foreign country, he did not know where, expected
 he was dead. Heard the defendant promise to give Wright
 a life lease of 50 acres of the land in York, in consideration
 of his giving defendant a deed of two hundred acres in Smith.

(On the part of the defendant this evidence was objected
 to, as being inadmissible, on the ground that the facts
 stated therein should have been set forth by the bill. The
 counsel for the plaintiff considered he was entitled to read
 the evidence ; the suit being brought on the ground of fraud,
 any evidence tending to show it ought to be received.

The Vice Chancellor directed the evidence to be read,
 subject to the objection.)

Blake for the plaintiff, after shortly stating the facts of
 the case, considered them, as stated in the bill, admitted
 by the answer and proved by the depositions, of the wit-
 nesses in the cause, so strong that it would not be necessary
 for him to cite any cases to show that the deed executed by
 the plaintiff would not be permitted to stand. It might be
 said that the evidence of an agreement to make the lease
 was not such as would entitle the plaintiff to a specific per-
 formance of the contract in that respect, but it was clearly
 sufficient to show that the plaintiff had been taken by sur-
 prise, and induced to sign a deed under circumstances that
 could leave no doubt on the mind of any one, that highly
 improper means had been made use of by the defendant to
 attain the object he had in view—the execution of the con-
 veyance by the plaintiff.

The attorney who drew the conveyance should not have
 acted in the matter as he had done ; having been employed
 by the grantee to prepare this voluntary conveyance, it was
 his duty to have directed the grantor to have taken other
 advice as to the propriety of the step he was about to take
 in executing such an instrument, the nature and effect of which

the grantor evidently was not aware of. Citing Story Eq. Jur. ss. 221, 237, 251 ; Huguenin v. Basely, 14 Ves. 290 ; Steed v. Calley, 1 Keen. 620.

Ramsay, with whom was *Eccles* for defendant.—The evidence of any agreement or promise of a lease is only parol, such evidence cannot be received to prove a contract of this nature ; the deed as executed, speaks for itself, and shows what the agreement was, and no evidence can now be received to alter or vary such agreement ; even written evidence, for such a purpose, would not be sufficient.

There is no evidence here sufficient to take the case out of the statute, part performance will not apply here, the execution of the quit-claim by the plaintiff is not a part performance of any contract for a lease, if any lease ever had been promised, for according to the plaintiff's own showing, it was merely the consideration for such a lease. Now, payment of the consideration is not in any case considered a part performance of a contract, sufficient to take it out of the statute.

The question here is, what was the concurrent intention of the parties at the time of executing the deed ? It is clear the intention was merely to convey the land to which the plaintiff had good reason to believe himself entitled ; a good consideration therefor, having been already paid to the son of the plaintiff, the benefit of which had been participated in by the plaintiff and his family.

The plea denies the agreement for the lease, that is, any agreement that would be binding under the statute of frauds, and this court, as well as a court of law, will give effect to such an objection, when taken by plea.

Citing amongst other cases, *Saunders v. King*, 6 Mad. 65 ; *Morris v. Ansel*, 3 Wil. 275 ; 1 Sug. 333, (9th Ed.) ; *Powell v. Edmunds*, 12 East, 6 ; *Townsend v. Stangroom*, 6 Ves. 328 ; *Woollam v. Hern*, 6 Ves. 212 ; *Rich v. Jackson*, 4 Bro. C. C. 518 ; *Harwood v. Wallis*, 2 Ves. 196 ; *Anon. Skin*, 159 ; *Peacock v. Monk*, 1 Ves. 128 ; *Langley v. Brown*, 2 Atk. 202 ; *Green v. Wood*, 2 Vern, 632.

Blake, in reply, assented to all that had been stated on the other side, except the applicability of it to a case like the present. It appears that the intention of the party who drew

the answer of the defendant, was to plead the statute of frauds. In this view of the matter, the plea is clearly bad, the great difference is between the pleading in the two courts; in the courts of common law, a mere denial of the contract is all that is required to give the defendant the benefit of the statute; but here the plaintiff is entitled to a full discovery of all the circumstances attending the transaction, and it is then for the court to decide whether or not there has been such a part performance as will take the case out of the statute, part performance being in this court sufficient for that purpose. He admitted the correctness of the argument as to parol evidence being inadmissible to vary or alter an agreement by a party seeking to enforce it, also that such evidence may be made use of as a defence, to show that the agreement is not what it was intended to be, and that therefore it should not be enforced; but it is equally sound law, that a party can come to this court, and upon parol evidence set aside a conveyance on the ground of fraud, misrepresentation, &c.; and a decree for the purpose of setting aside the deed executed by plaintiff to defendant, was what was most desired in the present instance; a decree for which, it was submitted, the court, upon the facts elicited in this case, would readily grant; it would be the most beneficial for the plaintiff, and as the evidence proved that the defendant had no title to the land for which he had agreed to give a lease, it was the only decree the court, under the circumstances, could properly make.

Friday, 30th January, 1846.

THE VICE-CHANCELLOR—The facts of this case appear to be as follows: James Wright, residing in the township of York, as heir at law of his sister Pamela Wright deceased, is the owner of a certain lot in the fourteenth concession of Smith, in the Newcastle District. About seven years before the institution of the present suit, it seems that the plaintiff's son, under the impression that he was the heir of his aunt Pamela Wright, made a conveyance of the land to one Coonat, who, in August 1844, gives a sort of release of his right to Patrick Henderson, as follows:

"I release for value my right to the within land to P.

“Henderson, and believe there is a mistake in the lot, and
“authorize him to get a correct deed.

A. COONAT.”

At this time Coonat and Henderson, aware of the badness of their respective titles, called on the plaintiff and requested him to go to the office of an attorney in Toronto, and make an affidavit that he, the plaintiff, had never given a deed for the lot so inherited by him; in consideration for his doing which, Henderson undertook to make to him and his wife, and the survivor, free of rent, a lease of fifty acres of improved land, with a house, &c., in the Township of York: being part of four hundred acres to which he pretended that he had a good title. How he could imagine that such an affidavit would confirm his claim to the land in Smith, it is difficult to understand: it is probable, from the result, that the proposal was only an invention to decoy the old man into Toronto.

After repeated solicitations, the plaintiff, who appears to be an infirm man, many years afflicted with the palsy, attended by his wife accompanies Coonat and Henderson to the office of a legal practitioner, with the ostensible view of making this affidavit. There is found, prepared from the previous instructions of Henderson, not an affidavit, but a deed of conveyance of the lot of land in Smith, with covenants for title &c., this the plaintiff refuses to execute: whereupon, a quit-claim deed, in consideration of one hundred pounds, with bar of dower, &c., is prepared for the signatures of Wright and his wife. This instrument, however unexpected, they are prevailed on to sign, in consideration of the promised life-lease of the fifty acres of improved land, &c., in the Township of York. No money consideration whatever passed between the parties.

It is very soon discovered that Henderson had no title whatever to the land from which the promised fifty acres were to be taken: and a scene of fraud is disclosed, (the evidence of which, I think, is admissible under the charges of fraud in the whole *res gestæ*) by which Henderson attempted to induce a person, for a sum of money, to go into the United States and procure a conveyance for him, by some

person professing to be the heiress to the land; the real owner being supposed to be one Elizabeth McDonell, residing in some foreign country, and whose tenant is now in possession, and paying rent either to her or her agent.

Finding himself entrapped in this manner, Wright files his bill, praying either that Henderson may be decreed specifically to perform his part of the contract, and execute a good and effectual lease, such as was to have been the consideration of the two hundred acres of land in Smith; or that the deed executed by the plaintiff and his wife may be declared void, having been obtained by surprise and fraudulent representations, &c.

It is objected by answer and plea, that this is not a contract which can be enforced within the statute of frauds, &c. Now, whether the giving of the consideration by the one party, and the acceptance by the other, be in the present case such a part performance as would take it out of the letter of the statute, it is hardly necessary to consider, since, however good in form the contract might have been there is this objection, that the court cannot decree specific performance of an agreement to convey another person's property. The plea is novel, and I think perfectly untenable; but the evidence is so strong, that the plaintiff's advisers seem not to have thought it necessary to except to the defendants answer for insufficiency, couched as part of it is in the form of an unstainable plea. But it is not necessary to dwell upon that part of the case: the fraud and that premeditated bad faith, and the knowledge on the part of the defendant that he had it not in his power to give the pretended consideration, is sufficiently clear to authorize the court to make a decree upon the other alternative of the prayer. A deed so obtained cannot avail the defendant. If he really believed that he had acquired, through Coonat, any equity against Wright through the act of his son, who had no title, (an equity founded on the suggestion, that as the son lived with his father, the father must have participated in the purchase money assumed to have been paid by Coonat), it was not to be enforced by such means as those to which he resorted.

VEXED QUESTIONS—FRAUDS.

We commence a series of articles on vexed Questions of Commercial Law, which we deem not only the most popular branch of jurisprudence, but one so intermixed with the daily concerns of life, that it is especially requisite that its principles be ascertained, that its provisions be precise, and its laws definite; nevertheless we find none in which doubts are rife, and discrepancies more prolific of litigation.

We regard questions of mercantile law of fourfold the importance of any other province or division of law.

The subject we have selected for discussion in this article is this:—Is a misrepresentation of a fact, on the faith of which another acts and is damnified, a fraud on the part of him who makes it without knowledge of its falsehood? In other words, is moral fraud essential to fraud in law, and the scienter to the right of action? The same point is involved in the question, whether he who undertakes to make a statement on which another acts, impliedly warrants its truth, and is liable for its falsehood, though he believed the statement to be true? In two very recent Exchequer Chamber cases, *Collins v. Evans* and *Ormerod v. Huth*, to which we shall revert presently, we find the point taken as settled, and admitting of little or no question; and in the latter case, *Tindal, C. J.*, is reported to have said that the rule there laid down appeared to be supported by the early as well as the most recent decisions. We humbly venture to think otherwise: and we proceed to trace the various discrepancies of judicial opinion from black letter law to the present day.

The doctrine that there may be a fraud in law, without fraudulent intent, is of comparatively modern growth. The old law knew no such cause of action. The parent of all actions for fraud is to be found in the old writ of deceit, which embraced all civil remedies for this class of wrongs. The name itself bespeaks the gist of the action; and in the old form of writ we find the words “*fraudulente et maliciose*,” thus marking the *malus animus*, which formed the essence of the injury;

and Fitzherbert (in his *Natura Brevium*, p. 95, edit. 1635) thus indentifies the character with the words of the writ :—
 “ Briefe de disceit gist come appiert *per nat. brev.* Et gist
 “ propermt, ou auc home fait auc chose en nosm dun autr. per
 “ que lautr. person est endammage et disceive, done cestui
 “ que est issint endemmage aurera cest briefe.”

We need scarcely remind the reader that in those times actions on the case, not being split on the one hand into the classes *ex delicto* and *ex contractu*, and *assumpsit* being a refinement of after growth,^(a) so on the other, actions for disceit were distinguished from actions on the case, though they now belong to them; thus in Brooke's Abridgement, p. 238 (we cite from the editions of 1573), is this passage
 “ videtur que ou home pmise per un consideracion de fair act,
 “ et ne fait, que action sur le cas gyst, mes ou home fayte
 “ son promise faussement que donque actyon de dysceyt gyst.” Nevertheless, in *Harvey v. Young*, Yelverton, 20, temp. 44 Eliz. (1602), the action was “ sur le cas en nature dun disceit.” It is not material to our purpose at what time all actions for deceit fell within the pale of torts, and formed part of the ramified family of actions upon the case; from which, at a more recent period, breaches of contract were dismembered. It suffices to show, that through a long current of cases this action was held to be maintainable only where there was a warranty, or where there being no warranty a falsehood was knowingly told, for a fraudulent purpose, on some point of fact, peculiarly within the knowledge of the person making the statement, and not equally within the knowledge of him to whom it was made. Writs of deceit chiefly lay in such cases of fraud as the purchase of a quare impedit in the name of another, the fraudulent acknowledgement of fines and recoveries by covin. Where the ground of the action was merely confined to a false affirmation, the writ was upon the case, in the nature of a writ of deceit, but based on similar principles.

One of the old cases of such an action was that cited in King

(a) See *Steuart v. Wilkins*, Doug. 18, whence *assumpsit*s on warranties derive their practical origin. See also *Williamson v. Allison*, 2 East. 446; see p. 91 post.

v. Robinson, Croke, Eliz. 79 (temp. 28 & 26 Eliz.), where the action was held maintainable by a swain deluded by the *blanda verba, matrimonio æqui pollentia*, whereby a lady induced him to spend time and money in her service, and then proved faithless, and married another in fraud and deceit of the plaintiff: the action was “upon the case for the deceit in not marrying” the plaintiff.

Most, though certainly not all, the old cases of frauds (as asserted by Grose, J. in *Pasley v. Freeman*, 3 T. R. 51) were cases of contract, where the misstatement was made by the vendor to the vendee relating to the thing sold. *Furnis v. Leycester*, Cro. Jac. 474, (temp. 16 James I.), was an instance of this sort. It was on the case for “falsely and deceptively” affirming that 200 sheep were the property of the defendant, *he knowing them to be a stranger’s*. Here the scienter is made an essential feature in the right of action. Also in *Springwell v. Alleyn*, 91 (temp. 24 Car. I.), of which a full note will be found in 2 East, 447, n., by Burnet, J. the defendant sold a horse without warranty as his own, whereas it was the horse of A. B.; “yet as the plaintiff could not prove that the defendant knew it to be the horse of A. B., the plaintiff was nonsuited.” So in *Chandler v. Lopus*, Cro. Jac. 4, where a jeweller sold a false stone as a bezoar stone, no action lay, because it was not averred that “he *knew* it was not a bezoar stone;” Anderson, J. dissentiente.

It was afterwards held that the *averment* of knowledge was not essential, where, from the nature of the case, the defendant was better aware of the facts than the plaintiff. See *Cross v. Gardner*, Carth. 90 (temp. 1 W. & M.), where it was held sufficient to aver that the vendor sold oxen as his own, they being the oxen of another, without a scienter, the action lying on the bare affirmation, where plaintiff has no means of knowing to whom the property belonged. But here also the defendant must have known the fact.

A similar principle governed the law with respect to the statement itself. In *Risney v. Selby*, 1 Salk. 211 (temp. 3 Ann.), which was an action on the case, the plaintiff being in treaty with the defendant for the purchase of a house, the defendant, says the report, did fraudulently affirm the rent to

be 30*l.*, whereas it was but 20*l.*, whereby he was induced to give so much more than the house was worth. It was contended that the “plaintiff was over credulous in taking the defendant’s word for it, but the plaintiff had his judgment; for “the value of the rent is matter that lies in the *private knowledge* of the landlord and his tenant, and if they affirm the “rent to be more than it is, the purchaser is cheated, and “ought to have a remedy for it.” But in *Harvey v. Young, Yelver.* 20 (44 & 45 Eliz.), the defendant affirmed that a term of years, which he sold to the plaintiff, was worth £150, whereas the plaintiff gave that sum, the term being worth only £100. But the court held that no action lay, for this was but a naked assertion of a fact, which the plaintiff’s folly alone induced him to give credit to; but that if the defendant had warranted the term, it would have been otherwise.

In *Leakins v. Chissell, Sider.* 146 (temp. 15 Car. II.), we find the distinction also drawn between the statement that houses are worth so much, and that they let for so much, the one being matter of opinion, the other of fact. See also 1 Rolle’s Abr. 91.

One of the most important cases on the capacity of the plaintiff to discover the fraud is that of *Baily v. Merrell*, 3 Buls. 94 (temp. 13 James I.), where the defendant gave the plaintiff (a carrier) a “cade of wood” to be carried, telling him it was 800 cwt., and that he should have 2*s.* per cwt. for the carriage. The carrier *fidem adhibens* carried without weighing, and killed two of his horses from the fatigue, the weight proving to be 2000 cwt.; but the court held that this was not a warranty, and that there was a “plain default by the carrier that he did not weigh this.” In this case Croke, J. said “If one lends his cart “to another, to carry a load of wood, and that he will have “for it 10*s.* a load; if he overload the cart, an [*Qu. no?*] “action lieth for this fraud without damage, for damage “without fraud gives no cause of action; but where these “two do concur and meet together, there an action lieth;” a dictum, by the way, misquoted by the judges in *Pasley v. Freeman*. This principle of care in the plaintiff formed a marked feature in the requirements of fraud to sustain an action according to the earlier cases; and we find the

same doctrine upon the same authority laid down in Rolle's Abridgment vol. i. p. 101, which brings the law down to the end of Charles I. Buller's *Nisi Prius*, written in 1771, brings down the cases to that date; and he thus describes the nature of the action and its elements. It will "lie wherever a person has by false affirmation or otherwise imposed upon another to his damage, who has placed a reasonable confidence in him; as, if a man in possession of a horse or a lottery ticket, sell it to another for his own, for possession of a personal chattel is a color of title, and therefore it was but a reasonable confidence which the buyer placed in him, when he affirmed it to be his own; but it is incumbent on the plaintiff in such a case to prove the defendant knew it not to be his own at the time of the sale (for the declaration must be that he did it fraudulently, or knowing it not to be his own). For if the defendant had a reasonable ground to believe it to be his property (as if he brought it *bona fide*), no action will lie against him; but the defendant cannot plead such matter, but must give it in evidence. So if the vendor affirm that the goods are the goods of a stranger his friend, and that he had an authority from him to sell them, whereas in truth they are the goods of another, and he had no such authority, an action will lie against him; and in such case it will be sufficient for the buyer to prove them to be the goods of another, without proving that the defendant knew them to be so (for it need not be averred in the declaration); for the deceit is in his falsely affirming he had an authority to sell them. *The plaintiff must therefore prove that he had no such authority*, and doubtless proving them to be the goods of another would be evidence *prima facie* that he had no authority, and sufficient to put him upon proving that he had."—p. 31, 1st edition.

Here also we find the fact of *wilful* misrepresentation retained as material to actionable fraud.

Although actions for deceit embraced a large variety of frauds, from the misstatements of salesmen to the bland words of faithless ladies, like the case cited in *Cro. Eliz.*, yet in all of them it was held essential to the action up to this time—

1. That the defendant should *know* the statement to be false, and make it with intent to deceive.

2. That it should relate to a fact peculiarly within the knowledge of the defendant, and not merely be a naked assertion of a matter of opinion, the truth or falsehood of which the plaintiff had the means of knowing, for the principle of *caveat emptor* was held to apply to such cases.

3. The plaintiff must have been damnified.

These form the essential requirements to the right of action for a fraud up to 1771. Up to that time no report had appeared containing any semblance of a judicial recognition of the doctrine of legal fraud without moral fraud.

In 1778 we find the earliest approach to that doctrine by Lord Mansfield, who was, we believe, the first judge who discarded the knowledge of the falsehood uttered as an essential feature of the action. In the case of *Pawson v. Watson* (Cowp. 785), which was an action against the underwriters on a policy of assurance alleged to have been made on a false verbal representation, that great judge said, "If in a life policy a man warrants another to be in 'good health, when he knows at the same time he is ill of 'a fever, that will not avoid the policy; because by the 'warranty he takes the risk upon himself. But if there 'is no warranty, and he says, 'the man is in good health,' 'when in fact he knows him to be ill, it is *false*. So it is 'if he does not know whether he is well or ill; for it is '*equally false to undertake to say that which he knows nothing 'at all of, as to say that is true which he knows is not true.* "But if he only says, 'he *believes* the man to be in good 'health,' knowing nothing about it, nor having any reason 'to believe the contrary, then, though the person is not in 'good health, it will not avoid the policy, because by the 'warranty the underwriter then takes the risk upon himself. So that there cannot be a clearer distinction than 'that which exists between a warranty which makes part 'of the written policy, and a collateral representation which, 'if false in a point of *materiality*, makes the policy void 'but if not material, it can hardly ever be fraudulent."

This forms, we believe, the first extension of the doctrine of fraud. The words in italics clearly go that length, and

give a scope to the range of actionable misstatements which the prior cases had invariably avoided, and in some instances expressly repudiated. It is however to be observed, that Lord Mansfield refers to such misstatements as affect the interest of the party making them; and he likewise restricts it to cases where the person making the statement does *not know it to be true*. Lord Mansfield's opinion does not, therefore, go the length to which we shall presently see other judges have gone, of holding that where the party making the statement *believes it to be true*, he is nevertheless liable. In 1789 occurred *Pasley v. Freeman* (3 T. R. 51), which is to this hour a leading case.

Pasley v. Freeman, whatever may have been the impression on the minds of the judges who respectively pronounced and dissented from the judgment, decided nothing more than this; that it is not necessary to an action on the case for a deceit, that the person making the false statement should derive benefit from it, or that he should collude with the person who is benefitted. This was not new law; it was nothing more than had been held before, and we concur with the view taken by Mr. Justice Buller, that authorities were not wanting on that point. He cited a case in 1 Roll. Abr. 91, pl. 7, where a vendor affirmed that the goods were the goods of a stranger, his friend, and that he (the friend) authorized him to sell them, upon which B. buys them, whilst, in truth, they are the goods of another party; yet if he sell them fraudulently and falsely in this pretended authority, though he did not warrant them, and although it is not averred that he sold them knowing they were the goods of a stranger, still B. has his action on the case for this deceit. And Mr. Justice Buller adds, "The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his inquiry, it proves his malice to be the greater." * * "*The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false.*" So that in *Pasley v. Freeman* the point was not involved whether there could be legal without moral fraud, for moral fraud existed in full force; nevertheless Mr. Justice Buller goes on to state

that "the assertion alone would not maintain the action; but "the plaintiff must go on to prove that it was false, and that "the *defendant knew* it to be so." Mr. Justice Ashurst took the same view, and said, "It is expressly charged that the "defendant *knew* the falsity of the allegation, &c."—"the gist "of the action is the injury done to the plaintiff, and not "whether the defendant meant to be a gainer by it. * * The "malice is the more diabolical if he had not the temptation "of gain." There could not be a more unsafe rule than to make the interest of the party giving the statement a test of his liability for its untruth; for how can that interest be always known? Might it not be concealed for the express purpose even of escaping from liability, were such a doctrine to prevail? All this, we repeat, was merely the expression of what had long been the law. Mr. Justice Grose, however, dissented from the rest of the court, because he could find no cases, except of contract between the parties, where the defendant had an interest in the fraud. This, as Mr. Justice Buller showed, was a mistake. Another ground taken by Mr. Justice Grose was, that the knowledge of the credit of a third party was a nude assertion of opinion, and fell within the rule in the case of *Harvey v. Young in Yelverton*, above cited: but this is not so: for it is clear that the knowledge of the credit of an individual must depend upon the degree of intimate acquaintance which a party possesses with him; and if he holds himself out as having this, he does possess means, which the plaintiff being a stranger has not, of ascertaining the fact. The decision of the rest of the court also went on broad grounds of social interest, which requires that parties should not be injured by false statements of the credit of others. The only new feature in this case was, that it was the first one where the subject-matter of the false statement was the credit of a third party; but this was properly held to be merely the application of an old principle to a new case. Lord Kenyon bases his judgment on the facts thus tersely put in its concluding words:—"It is admitted that the "defendant's conduct was highly immoral and detrimental to "society; and I am of opinion that the action is maintainable "on the grounds of deceit in the defendant and injury and

“loss to the plaintiffs.” The animus, the falsehood, and the injury were certainly sufficient to counterbalance the want of apparent interest and the novelty of the subject-matter of the fraud; and this is all that *Pasley v. Freeman* decides. Lord Mansfield’s dictum in the last case was not alluded to, nor was their occasion that it should have been; for here moral fraud and the intent to deceive fully existed; but this case is well worthy of note for the distinct adherence of two of the judges, Buller and Ashurst, to the doctrine that knowledge of the falsehood by the defendant is essential to the action. The latter judge says, the *quo animo* is a great part of the gist of the action; and so it was also ruled by a majority of the court in the case to which we must next refer.^(a)

Haycraft v. Creasy, 2 East. 92 (A. D. 1801), was the first case in which the question arose whether the knowledge of the fraud by the defendant was essential to the action.

The defendant vouched for the credit of Miss R., “as he the defendant *knew* that she was then in possession of considerable property, &c.” He is then asked if he knows this only by hearsay; he replies, “I can positively assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety.” The defendant had himself trusted her, and fully believed in the truth of his statement, for which he had reasonable ground. Miss R. however proved to be an imposter, and the plaintiff, who had given her credit on the faith of the defendant’s statement, sued him for the loss in an action on the case for false, fraudulent and deceitful representations. The majority of the court held that the action would not lie, on the ground that fraud and deceit was the foundation of the action; and that this was not fraud, because the defendant believed his statement to be true. Grose, J., thought it only the expression of his firm belief and conviction. Lawrence, J., thought that, “in order to support the action, the representation must be made *malò*

(a) *Eyre v. Dunsford*, 1 East. 318, is merely an echo of *Pasley v. Freeman*. On a representation of credit false to the knowledge of the defendant though he had no apparent interest in making it, and made it without prejudice, the action was held to lie.

“*animo*, and that there must be something more than mis-
 “apprehension” or mistake; but this he stated with doubt
 and distrust of his own opinion, in deference to that from
 which he differed (Lord Kenyon’s). Leblanc, J., said, “By
 “fraud I understand an intention to deceive,” without
 which the action is not maintainable. But what says Lord
 Kenyon? Referring to the case of *Pasely v. Freeman*; in
 which he had expressed no opinion on this point, he says—

“I indeed was not then so well versed in the critical form
 “of actions, but I had endeavoured to store my mind with
 “established principles, and I have learned that laws were
 “never so well directed as when they were made to en-
 “force religious, moral and social duties between man and
 “man; and I knew that it was repugnant to such duties
 “for one man to make false representations to another to
 “induce him to take measures which were injurious to him.

“ * * * It is said that I imputed no fraud to this
 “defendant at the trial. It is true that I used no hard
 “words, because the case did not call for them; it was
 “enough to state that the case rested on this,—that the
 “defendant affirmed that to be true within his own know-
 “ledge that he did not know to be true. “*This is fraudu-*
 “*lent*; not perhaps in that sense which affixes the stain of
 “*moral turpitude on the mind of the party, but falling within*
 “*the notion of LEGAL FRAUD, such as is presumed in all the*
 “*cases within the Statute of Frauds.* The fraud consists,
 “not in the defendant’s saying that he believed the matter
 “to be true, or that he had reason so to believe it, but in
 “asserting positively his knowledge of that which he did
 “not know. There are, its true, some duties of imperfect
 “obligation, as they were called, the breach or neglect of
 “which will not subject a party to an action. If I know
 “that one in whose welfare I am interested is about to marry
 “a person of infamous character, or to enter into commer-
 “cial dealings with an insolvent, it is my duty to warn
 “him, but no action lies if I omit it; but if any one be-
 “come an actor in deceiving another—if he lead him by any
 “misrepresentations to do acts which are injurious to him, I
 “learn from all religious, moral and social duties, that such
 “an action will lie against him to answer in damages for his

“acts. And when I am called to point out legal authorities for this opinion, I say that this case stands on the same grounds of law and justice as the others which have been decided in this court on the same subject.”

Let us at once back this bold and righteous doctrine with the opinions of the great judges and lawyers who have maintained it, returning hereafter to the current of decisions which form the tail, and follow in the wake of *Js. Grose*, *Lawrence* and *Leblanc*.

First and foremost stands *Sir James Mansfield*. The doctrine which we found *Lord Mansfield* first broaching in *Pawson v. Watson*, in 1778, we find *Sir James Mansfield* holding and making the basis of his judgment in the case *Schneider v. Heath* (3 Camp. 506), A. D. 1813), which was an action for money had and received on the ground of fraud and misrepresentation, which consisted in a bill of particulars falsely describing a ship as seaworthy, which the person giving it had not examined, and did not know to be unseaworthy. In his judgment *Mansfield, C. J.* says, “The agent tells us he framed the particulars without knowing anything of the matter. *But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false.*”

There is also a dictum of *Best, C. J.*, exactly to the same effect, in *Adamson v. Jarvis* (4 Bing. 66); “He who affirms either *what he does not know to be true*, or knows to be false, to another’s prejudice and his own gain, is both in morality and law, guilty of falsehood, and must answer in damages.” That was a case, however, in which the defendant had a direct interest in the fraud, but *Pasley v. Freeman* decided that interest was not necessary to the action.—*To be continued.*

THE UPPER CANADA JURIST.

IN CHANCERY.

SATURDAY, 13TH DECEMBER, 1845.

BARNHART V. PATTERSON AND GREENSHIELDS.

PRACTICE.

Where one of several defendants has become bankrupt, his assignees are necessary parties, and the court will not proceed to make a decree in their absence.

In this case a bill had been filed to redeem a mortgage given by the plaintiff to the defendant Patterson, which had subsequently been assigned by him to Greenshields, to secure certain debts due by Patterson to Greenshields.

After the answers of the defendants had been put in, Patterson became bankrupt. The plaintiff having replied, and served the usual subpoena to rejoin, took no further proceedings in the cause, in consequence of which the defendant Greenshields served rules to produce witnesses and pass publication, in the name of both defendants ; but the plaintiff had not examined any witnesses, or taken any steps, and Greenshields set the cause down for hearing ; and on this day

Esten, for the plaintiff, moved to have the cause struck out of the paper for irregularity, on the ground that by the bankruptcy of the defendant, Patterson, his assignees had become necessary parties, and until they should be made parties, the suit was so defective, that the court could not make a decree; that Greenshields having taken out rules to produce, &c., in the name of both defendants, was clearly irregular; the course that should have been adopted by him, if he desired to force the suit on, was to have moved, that unless the assignees of his co-defendant were brought before the court, within a

time to be limited, the bill should thenceforth stand dismissed ; this is clearly the practice when the bankrupt is a sole defendant ; and the fact of there being other defendants, who are not bankrupts, cannot alter the practice in this respect.—1 Smith, 514.

If the bankrupt were not a necessary party to the suit, the cause might be proceeded with in the absence of his assignees, but here he had been an interested and necessary party, and his assignees are the legal holders of the lands, and will be entitled to receive any overplus that may be coming after discharging the claim of Greenshields. If, therefore, the court were to make a decree, it must necessarily be incomplete, and the court will not, in any case, make an incomplete decree, when the facts are brought under its notice. And as both defendants appear by the same solicitor, Greenshields cannot say he did not know of the bankruptcy of his co-defendant.

The suit, as originally instituted, was perfect, and only became defective during its progress, and therefore, the ordinary rule of dismissing for want of parties will not apply to a case like the present.

Brough and Crooks, for the defendants. The plaintiff here wishes to take advantage of his own wrong, in having allowed the cause to remain in its present imperfect state. The plaintiff must either ask for the cause to stand over, in order that he may make the assignees parties, or else dismiss his bill ; the court, it is submitted, will adopt the latter course.

The defect in the suit is the fault of the plaintiff, and by allowing it to remain in its present state he might tie up the cause for ever, unless the defendant Greenshields were allowed to proceed in the manner he had, and set the cause down for hearing ; the plaintiff having filed a replication and served a subpoena to rejoin, it is clear an ordinary defendant could not move to dismiss for want of prosecution ; the only course left for him to take would be that taken in the present case.—*Tozer v. Tozer*, 1 Cox 288.

The assignees of the bankrupt defendant cannot be benefitted by being made defendants, nor do they desire to become parties to the suit in any way. And as the plaintiff was the party who should have taken the necessary steps to make them

parties, and has chosen not to do so, the court, it is submitted, will now dismiss the bill with costs.—*Monteith v. Taylor*, 9 Ves. 615; 5 Sim. 497; 11 Law Jour. N. S. pt. 1 p. 280, were also cited.

THE VICE CHANCELLOR.—There can be no doubt that the assignees of the defendant Patterson are necessary parties to be brought before the court, and in their absence the court cannot properly make any decree; the cause must therefore be struck out of the paper; but as the steps necessary for making them parties should have been taken by the plaintiff, I do not allow him his costs of this motion.

FRIDAY, 23rd JANUARY, 1846.

GEDDES V. MORLEY ET AL.

PRACTICE.

This Court will not grant an injunction at a suit of a mortgagee of chattels, against a judgment creditor of the mortgagor, to prevent a sale of the chattels, the rule being of universal application that the Court will protect the specific possession of chattels only in case they are of peculiar value.

In this case a bill had been filed, stating to the effect that the plaintiff had advanced certain monies to W. A. Geddes, in consideration of W. A. Geddes undertaking to execute and who had accordingly executed a bill of sale by way of mortgage of certain chattels, consisting of household furniture, &c., to secure the repayment of the amount advanced by the plaintiff, and that afterwards the defendants had issued an execution against the goods, &c., of W. A. Geddes, and seized the property, assigned to the plaintiff; W. A. Geddes having continued in possession thereof.—The bill prayed an injunction to stay the sale, &c. Upon an affidavit verifying these statements of the bill, a special injunction as prayed had been obtained; the defendants had filed a demurrer to the bill for want of equity, and now

Blake, for the defendant, moved to dissolve the injunction with costs. The general rule of this court is, that an injunction will not be granted to interfere with the enjoyment of chattels, unless some peculiar value attaches to them, as in the

case of heir-looms ; *Lloyd v. Loaring*, 6 Ves. 773. The plaintiff will no doubt rely upon the case of *Lady Arundel v. Phipps*, as a ground for retaining the injunction in the present case ; that case however, is not applicable to the present ; there, the property sought to be preserved was such as brought the case within the class of those excepted from the general rule of the court, against interfering with chattel property ; here no such ground exists, the articles are not only of no peculiar value, but the value of them in the opinion of the plaintiff is affixed to each article in the schedule accompanying the bill of sale ; and where the value can be given in damages either in an action of trover or trespass, this court will not interpose to prevent a party at law proceeding in the usual way to recover his demand. Citing also 1 Mad. C. P. 222 ; *Eden on Inj.* 313 ; *Jeremy's Eq. Juris.* 467 ; 1 Madd. R. 150.

Esten, contra, cited the case of *Truscott v. Dunn* in this court, as showing that the rule, that the court would not interfere when the subject in dispute was chattel property, was not inflexible, and in the present case the plaintiff had advanced the money, not on the personal security of any one, but on the specific security of the goods contained in the schedule ; those goods ought therefore to be preserved in specie, and in such a case the jurisdiction of this court arises. In an action of trover or trespass, all that the plaintiff would recover would be damages ; that however, was not what he had contracted for as security, when making his advances, nor was it reasonable that he should be now driven to the circuitry of an action after having obtained what he considered security on certain specified property, sufficient to answer his demand.—Citing *Lady Arundel v. Phipps*, 10 Ves. 139 ; *Lord Cooper v. Baker*, 17 Ves. 128.

Blake, in reply. *Lord Cooper v. Baker* is not in point, the trespass in that case was in the nature of a trespass to the realty.

What was the intention of the party when he obtained the injunction ? It was to protect him in his mortgage. But if such an equity exist in favor of a mortgagee of chattels, *a fortiori* it would exist in favor of the owner of such goods ; but it is clear there is no such right in favour of the owner,

nor can there be any in favour of a mortgagee, simply upon the general principle that the court will in no case interfere with the possession of chattel property, unless a peculiar value be attached to it by the party claiming it.

Injunction dissolved—costs to be costs in the cause.

[NOTE.—The demurrer which had been filed, was subsequently submitted to by the plaintiff.]

TUESDAY, 3RD MARCH, 1846.

KINGSMILL V. GARDNER.

PLEADING.

A demurrer will not lie to a bill of foreclosure on the ground that the bill does not show that the plaintiff had actually paid a money consideration for the mortgage, or because it does not offer to do equity.

It appeared by the bill, that the defendant Gardner had been a prisoner within the limits of the Gaol of the Niagara District, and that Lockhart had become his security to the sheriff by bond, under a penalty to secure the sum of 163*l.* 16*s.* 8*d.* To save Lockhart “*harmless for or on account of any action, &c., which might at any time be brought against him, his heirs, &c., by reason of the said James Lockhart’s having become security, &c.,*” a mortgage was given of certain hereditaments in the county of Lincoln; that Gardner had departed from the limits of such gaol, and an action on the case for an escape had been brought, and judgment recovered against the plaintiff, as sheriff, who thereupon brought his action on the bond against the defendant and his surety Lockhart for the sum of £293 1*l.* 11*s.* 11*d.*, for which amount judgment had been recovered. That by indenture of 6th May, 1845, Lockhart, in consideration of being discharged and released from the said judgment, assigned the said mortgage to the plaintiff; that no money had been paid on such judgment; and it prayed the usual account, and in default of payment of the amount due, that the defendant might be barred and foreclosed of and from all equity of redemption, &c.

A demurrer was filed on the grounds, first, that it did not appear that any good consideration had been given to entitle

the plaintiff to institute a suit for foreclosure. The sheriff had shewn only a liability, but not a payment ; secondly, that the suit was for the whole of the mortgaged property, without any offer to pay over the difference if any should be found due : it contained no offer on the part of the plaintiff to do equity.

Mr. Ramsay, in support of the demurrer.

Mr. Brough, contra.

THE VICE CHANCELLOR.—Under the new orders simplifying and abridging the pleadings in suits for foreclosure and redemption, all that is necessary to state, in such a case as will warrant the court to send it to the master to enquire as to the amount actually due in respect of the transaction. On the first ground I think there is sufficient on the bill to show that the action and liability against which the surety was to be protected on account of his joining in the bond to the sheriff did occur ; and that the mortgage so far had become absolute. Whether Lockhart satisfied the sheriff by a money payment and proceeded himself in equity on the mortgage, or satisfied the sheriff by assigning the mortgage, leaving him to take such ulterior proceedings, could make no difference to the defendant. The sheriff's absolute liability to the defendant's judgment creditor is, I think, a sufficient *prima facie* case. With regard to the other objection, it is well answered by the prayer of the bill, which is for an account between the parties. The very idea of *an account* involves the doing as well as receiving equity under the administration of the court. It is usual in bills to be relieved against a fraudulent or usurious contract, to insert such a submission ; but it is upon the *facts* of the case stated, the *prima facie* right to the aid of the court must be judged of.

Demurrer overruled.

TUESDAY, 27TH JANUARY, AND FRIDAY, 27TH FEBRUARY, 1846.

SCHRAM V. ARMSTRONG.

PLEADING—EVIDENCE—PARTIES.

Where a party had given a mortgage to secure a debt for which he had made himself liable as surety, and had received from his principal a mortgage on his own estate for the same debt, &c., afterwards filed a bill to foreclose the latter and redeem the first mortgage, and the principal at the hearing objected to the bill on the ground that it was multifarious. Held, that the objection, if tenable, should have been taken by demurrer, and was too late at the hearing; and, quære if such objection would have been sustainable under the circumstances of the case.

Held also, that evidence taken by the plaintiff to contradict statements made in the answer was admissible, though not put in issue by the bill.

Evidence not read in the cause cannot be made use of by the defendant to show that the suit is defective for want of parties; such defect must be apparent from the pleadings and evidence.

The facts of the case appear in the judgment of the court.

Mowat and Vankoughnet, for plaintiff.

Esten for defendant.

Davis v. Quarterman, 5 Jurist, 93; and Story Eq. Pl. ss. 271, 272, were cited by plaintiff.

THE VICE-CHANCELLOR.—It appears from the bill, &c., that in the month of April, 1842, the plaintiff endorsed a promissory note for £200, payable six months after date, for the accommodation of Armstrong and Black, then indebted in that amount to Leonard Thompson. To secure the plaintiff against any loss by payments or costs in respect of this note, they executed to him a mortgage, dated 25th August, 1842, of a town lot in London. The promissory note was not paid by the drawers when at maturity, and an action was brought against the plaintiff by the defendant Thompson. To prevent an execution being issued against his effects, and to secure to Thompson the amount of his debt and interest, and the costs incurred in the action, the plaintiff executes to him a mortgage upon certain property of his own.

Black having assigned his interest in the mortgaged property first named to Armstrong, a further mortgage dated 7th September, 1842, and purporting to be for the consideration of £200, was made by Armstrong to Falconer, another defendant, who afterwards by indenture dated 4th January, 1843, executed a conveyance of his interest therein to Gunn & Brown to secure the sum of 140*l.* 4*s.* 6*d.* The bill

charges that these subsequent incumbrances were taken by the sub-mortgagees with full knowledge of the plaintiff's previous title; and that the prior registration of the defendant Falconer's mortgage was fraudulent, and of no effect, there having at the date of the plaintiff's title, been no registration of any mesne conveyance since the grant from the crown. It avers that the plaintiff had been put to considerable costs and charges in respect to the note so endorsed by him for Armstrong and Black and the action brought thereupon; that the mortgaged estate had become absolute at law: and the complainant prays that an account may be taken under the direction of this court of what had been secured to the said defendant Thompson for principal, interests and costs secured by the said mortgage given by Armstrong and Black to the complainant, and of the damages, costs and expenses incurred by him by reason of such indorsation; and that the [other] defendants or some of them may be decreed to pay the same, together with the plaintiff's (and the defendant Thompson's) costs of this suit, or be foreclosed of all equity of redemption, &c.; and that the mortgaged premises may be sold, &c.; and that, on satisfaction of the said Leonard Thompson of the monies so secured to him as aforesaid, he the said Thomson may be decreed to reconvey the premises so mortgaged to him by the complainant.

To this bill there are several objections raised. First, that it is multifarious, being for a foreclosure in one aspect of the suit, as regards the defendant Armstrong and those claiming under him by a title subsequent to that of the plaintiff; and for a redemption as against Thompson: the plaintiff appearing in the same cause in the double character of mortgagor and mortgagee; praying for the sale of property as against one set of defendants, for the purpose of furnishing funds wherewith to redeem as against another. That, to entitle a party to foreclose, there must be an actual debt; whereas in the present case there is a mere liability—the debt due to Thompson not being paid but merely secured by another mortgage. To dispose of the last point first, I am of opinion that there is sufficient evidence of payments and loss sustained by the complainant in consequence of his having

made himself liable for Armstrong and Black's debt, to protect him against all loss in respect to which transaction the mortgage was given; to entitle him to adopt this proceeding as regards Armstrong(a).

Upon the other point, it is clear that the court will not permit a plaintiff to demand by one bill several matters of *different natures* against several defendants(b); for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connection.(c) To such a bill a demurrer will lie. But where one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold.(d) The court is equally averse to allowing a bill for the settlement of one portion of a matter, where the nature of the transactions and the relation of the parties to each other will permit of the several issues being embraced in one suit.

The present bill is certainly somewhat novel in its nature; but it can hardly be said that (putting the sub-mortgagees Falconer, &c., out of the question) the rights of the plaintiff against Thompson, and against Armstrong and Black, are so different in their nature and inception as to render it impossible to combine the settlement of them in one suit. It was to pay the debt due from Armstrong and Black to Thompson that the plaintiff's liability on the note arose; and to protect him against loss upon which the mortgage was given. It was in satisfaction of such debt with interest, and the costs of the action at law, that the charge was made upon the plaintiff's own property and accepted by Thompson. The whole suit arises out of one transaction, though it includes two mortgages. Thompson does not object to the present course; for the manifest object of the suit is, that he in effect may have the benefit of the security already given in order to facilitate the payment of his debt, and at the same time relieve the property of the plaintiff from the incumbrance rendered necessary by the defendants's neglect or inability to meet their own engagement; the complainant thus avoiding the circuitry

(a) See also *Kingsmill v. Gardner*, ante p. 325.

(b) 5 Mad. 146.

(c) Mitf. 181.

(d) Mitf. 182, and cases there cited.

the circuitry of resorting to one suit to obtain the money, and to another to be permitted to apply it in redeeming his own estate. I do not see any difficulty in taking this twofold account in one suit; while the additional extent of the pleadings arising from this consolidation is trifling compared to what must have followed, and the expenses incurred by some of the parties, if the plaintiff had instituted two distinct suits; so that whatever doubts I might have entertained, in the absence of any case precisely parallel, I should not have been inclined to favour the objection, even if it had come in time, which it has not. It is one which cannot be made at the hearing. In *Ward v. Cooke*(a) the same objection was made and overruled. The Vice-Chancellor Sir Thomas Plumer held that, if a bill be multifarious (even admitted to be so), it should have been objected to by demurrer, and that it was too late to make that objection on the hearing of the cause.

Another objection is for want of parties. That it appears from the evidence of one O'Neill, a witness in the cause, but whose depositions are not made evidence by being read, that he (O'Neill) had some interest, which was intended to be secured by the mortgage from Armstrong and Black to the complainant, in respect to a debt due, at the time of making it, from the mortgagors to the witness; and that, although testimony not made evidence by the plaintiff who takes it cannot be used by the other side for the purpose of substantiating any part of their case, yet that it may be brought to the attention of the court with a view to its interposing to stay a suit defective from the absence of a party interested. I admit the court is bound of its own will to notice any such defect as must necessarily render the suit imperfect, and the decree thereon inconclusive; but to render this the duty of the court, the defects must be apparent upon the *pleadings and evidence*.

The next matter of defence set up on the part of Falconer is the plea contained in the answer, that at the time of taking such mortgage the defendant Armstrong was in possession, and claimed to be seized in fee, &c.; and that he (the defendant) was a purchaser for valuable consideration, without

(a) 1820, 5 Mad. 122.

notice of the prior incumbrance. And it is contended that this fact being stated in the answer, and there being evidence of notice by one witness only, the rule of attaching, in such case, the principle weight to the answer, must prevail. But this rule only applies to cases where there simply appears to be oath against oath, and where neither is weakened by inconsistencies or aided by circumstances. Wherever probabilities or improbabilities exist, for or against such statements, founded on or contradicted by a single oath, the court has the same power that a jury has, in judging of the respect to be paid to either. First, let us examine the caution with which other facts are sworn to in the answer. After having shewn the descent of the title to the mortgaged premises from the crown, he states that he did not require the several title deeds to be delivered to him ; but that *“ the same were in the possession of the said Armstrong at the time that he so made much mortgage to this defendant; which fact contributed to produce in the mind of this defendant the belief that the said Armstrong was seized in fee simple in possession of the said premises free from all incumbrances.”* Here is a fact sworn to, not lightly as an unimportant matter which might be stated carelessly and erroneously, but one, the knowledge of which influenced his action in taking this mortgage. Yet the statement is not true ; for each of these deeds, including the patent from the crown, are proved *not to have been* in the hands of Armstrong since the execution of the previous mortgage by himself and Black to the plaintiff, but were then in the custody of one of the witnesses to the deed and memorial, who held them for the plaintiff. If the defendant could be mistaken on such a point as this he may be mistaken as to the notice, or perhaps as to what he might deem the sufficiency of the notice. At all events, here is sufficient to let in and give full effect to the evidence of Mr. Horton, which is exceedingly special, unimpeached, and strongly corroborated by that of Mr. Murray.

Mr. Horton in his testimony states, that about the time the mortgage was made from the defendants Black and Armstrong to the plaintiff, he heard them say that the plaintiff had endorsed a note for them for £200, and that the mortgage was given to secure plaintiff : that he was the subscribing

witness to the deed from George Mitchell [the grantee of the crown] to Armstrong and Black ; and that witness and one Stuart were the subscribing witnesses to the mortgage from Armstrong and Black to the plaintiff: that the deed from Mitchell and the mortgage were given to witness, for the purpose of taking them to the register office to prove them, as he (Horton) was a subscribing witness to both instruments. The patent from the crown to Mitchell had been previously in the custody of witness, and so remained in his possession till the time that Hugh Falconer's mortgage was drawn—a few days after the execution of the mortgage to plaintiff,—when one Cleverly, (since deceased) borrowed it of witness, as he was about to prepare the mortgage to Falconer as attorney for Falconer. And, in answer to a subsequent interrogatory, Mr. Horton says :—“ Some days after the deeds “ were placed in my hands, as already mentioned, the defend- “ dant Falconer, either alone or in company with Mr. Clever- “ ly his attorney, met me, and asked me whether the plain- “ tiff had any mortgage on the lot mentioned in the pleadings. “ I then informed him that the defendants Black and Arm- “ strong had given plaintiff the mortgage then in my posses- “ sion on said lot, and I told Falconer the full particulars of “ it; Falconer then said Armstrong and Black owed him, and “ that he wanted to get a subsequent mortgage to secure “ such debt. I told him that the security would not be “ much as the lot was not worth much, if anything, more than “ the amount of plaintiff's mortgage. Falconer replied he must “ take it or get nothing. Next day Mr. Cleverly called at my “ office and borrowed the patent, when I told him (Clever- “ ly), half in joke, that there must be no trick about it ; he “ must not attempt to cut the plaintiff's mortgage out, or “ get Falconer's when drawn registered first ; to which “ Cleverly replied ‘certainly not;’ and it was agreed be- “ tween us that we should go to the register office to- “ gether, I with the said deed and mortgage for the plain- “ tiff, and the said Cleverly with the subsequent mortgage “ to Falconer, when prepared, to get registered, and that “ the said deed and mortgage in my possession should “ be registered first. On the day the said mortgages “ were registered, Mr. Cleverly came to me and told me to

"hurry and go to the registrar and get the deed in in my cus-
 "tody registered, as Falconer had been to him (Cleverly)
 "and had requested him, as a witness to the mortgage to him
 "self, to go and get it registered at once before the plaintiff.
 "Cleverly told me he had refused to comply with such request,
 "and Falconer thereupon obtained from him the mortgage,
 "and was going for the other witness to it (Mr. Murray), to
 "get it registered, I immediately hurried to the registrar
 "and found that Falconer and Murray had arrived there
 "before me, and had succeeded in getting said mortgage
 "proved for registry before the plaintiff's. I expostulated
 "with Falconer and told him it was most unfair to the plain-
 "tiff, and remonstrated with him about it. Falconer replied,
 "'every one should look out for himself.'"

Mr. Murray in his evidence states that, "in September,
 "1842, Falconer met me and requested me to go with him
 "to the registrar and prove the execution of a mortgage from
 "the defendants Armstrong and Black to him; which mort-
 "gage I had previously witnessed. I accompanied Falconer
 "to the registrar, and proved the mortgage. On my way
 "Falconer walked very fast, and appeared to be in a hurry.
 "I asked him why he was in such a hurry; to which he re-
 "plied, that he was 'afraid Mr. Schram [the plaintiff] would
 "get his mortgage on the same premises registered first.'"

An objection has been made to that part of this testimony
 relating to the grant from the crown to Mitchell, and the
 deed from Mitchell to Armstrong and Black, they not being
 alluded to in the bill. Falconer, however, having himself
 referred to them in his answer, and in support of his plea
 stated them to have been in the hands of Armstrong, &c.,
 has made a reference to them part of his case; I therefore
 think the whole is admissable.

It is stated in the bill that at the respective times of the
 execution of the mortgage to the plaintiff, and of the subse-
 quent mortgage to the defendant Falconer, and each of the
 said times, no memorial of any conveyance or mortgage
 relating to the mortgaged premises had been registered
 according to the statute in that behalf; and it appears, from
 the registrar's certificates, that, the deed from Mitchell the

grantee from the crown to Armstrong and Black, the mortgage from Armstrong and Black to the plaintiff, and (from Horton and Murray's evidence, for the deed itself is not among the exhibits) the mortgage from Armstrong to Falconer, were all registered on the same day—19th. September, 1842—Falconer in his answer says the 17th. but this may be another mistake. Now, under these circumstances, the precipitate registration of the mortgage taken with the knowledge of the plaintiff's previous title, could not avail him; and the registration made by the plaintiff a few minutes afterwards, being a work of mere supererogation in itself, cannot now prejudice him, but must stand as the first enregistration, the other having been a mere fraud.

It is contended however that, though Falconer's plea as purchaser for a valuable consideration without notice should not be sustained, yet that there is no evidence of such notice as against Gunn & Brown. In the absence of direct testimony, we must examine their answer. They state that, shortly before the execution of the assignment of the mortgage from Falconer, they caused the proper registry office to be searched, and found that the indenture of mortgage from Armstrong to Falconer was the first mortgage of the premises on record, &c. But what was the ground-work of the whole transaction? It appears from the answer itself that Armstrong, having become indebted to them in the sum of 140*l.* 4*s.* 6*d.*, had given to them a promissory note for that amount dated 26th July, 1842, which note was endorsed by Falconer, but was not paid when at maturity either by the maker or endorser. In satisfaction of this debt the mortgage already made by Armstrong on the 7th September to Falconer, was by him assigned to Gunn & Brown, and the note delivered up to him. It is not pretended that Armstrong was indebted to Falconer in any way but in respect to his then approaching liability on the note. The nominal consideration in the deed to Falconer is £200; but the consideration of the assignment to the defendants is the precise sum of 140*l.* 4*s.* 6*d.* The deed in fact recites that they were interested as to this amount in the mortgage to Falconer, in which case they were bound by the knowledge of Mr. Cleverly, the solicitor, who in that transaction

must it appears, have been acting on their behalf through Falconer. Why the mortgage was not given by Armstrong direct to Gunn & Brown does not appear ; but I cannot help coming to the conclusion, from the equivocal account of the matter given by the parties interested, that this circuitry was adopted with a view to deprive the plaintiff of his priority, by a colourable removal of the defendants one step further from the original mortgagor.

With regard to costs, it has been urged on behalf of Armstrong, that they ought not to be allowed to the plaintiff in respect to the redemption of his property ; inasmuch as he having been surety, it was his duty, on default of his principal, to have paid the debt ; and that, although compelled to this by an action at law, the costs arising therefrom would not have been so much as must necessarily have accrued from his having satisfied the debt by means of the mortgage, &c. It is true that the plaintiff, as surety, was morally and legally bound to fulfil his undertaking ; but the argument does not come with much force from the principal, whose legal and moral liability were at least as great as that of his surety, and whose omission in respect of his primary duty had been the origin of the evil.

Judgment for the usual decree of foreclosure and redemption.

VEXED QUESTIONS.—FRAUDS.

(Continued from page 320.)

The case of Cornfoot v. Fowke (6 M. & W. 358), is fresh in the memory of our professional readers. The question arose on a plea of fraud and covin to an action for the rent of a house, which the agent of the plaintiff had assured the defendant that there was no objection to. The plaintiff, the landlord, however, well knew that there was a grave objection to the house, of which he made no mention to his agent, and the agent was wholly ignorant of such objection when he made the false statement alleged in the plea. In this case the majority of the Court of Exchequer held that the defence

was bad upon the grounds thus stated by Mr. Baron Parke.

“The alleged fraud consists in an untrue representation made by a house agent employed by the plaintiff, in an answer to a question by the defendant. The question was, whether there was any objection to the house; the answer, that there was none; and it appeared that the next door was a brothel, and that the plaintiff knew it before, but the agent did not. My Lord Chief Baron thought the plaintiff was bound by the agent’s representation, and left the question to jury, whether that representation was intended to relate to intrinsic objections only or applied to extrinsic objections also. The jury found that it was meant and understood to refer to both: and to the mode in which that question was left to the jury, or their finding upon it, no objection is made. But it is said, and I think justly said, *that it is not enough to support the plea that the representation is untrue; it must be proved to have been fraudulently made.* As this representation is not embodied in the contract itself, the contract cannot be effected unless it be a fraudulent representation, and that is the principle on which the plea is founded. Now the simple facts that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud; each person is innocent because the plaintiff makes no false representation; and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud. No case could be found in which such a principle is laid down as was admitted in the course of the argument. It must be conceded, that if one employ an agent to make a contract, and that agent, though the principle be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action. Lord Holt held that in an action of deceit for selling one sort of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond sea, the merchant was liable; *Hern v. Nichols* (1 salk. 289). But in the present case the agent acted without any fraudulent intent; and, therefore, his act alone neither renders the plaintiff liable to an action nor vitiates the contract. It must also be admitted, that if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff

“would unquestionably be guilty of a fraud, and the contract would be avoided; for then the representation of the agent, which he intended to be made, would be the same as his own, and his own representation, coupled with his knowledge of its falsehood, would doubtless be a fraud. But whether the facts in the case would warrant an inference that such a fraud was committed, it is unnecessary to inquire, as, if they would, this question should have been submitted to the jury.”

Nothing can carry the doctrine further than this; it almost outstrips the subsequent judgment in *Taylor v. Ashton*, which we shall presently cite. The injury here was unquestionably great; and a fact which on any principle of common honesty ought to have been disclosed to the defendant is kept from his knowledge. The non-communication to the agent was the means whereby the defendant was misled and damnified, and yet that very ignorance is made the ground of denying redress to the defendant; the defence of the plaintiff is his own wrongful act, and this the court upholds as law; for if the agent had been made acquainted with the objection, it is admitted that the plaintiff could not have maintained his action: but because the plaintiff improperly keeps him in ignorance, the defendant is left without redress. Mr. Baron Parke thinks, if the plaintiff had purposely withheld the knowledge of the fact from his agent in order that he might deceive the defendant, the case would have been otherwise; that is to say, the liability of the party benefitting by a fraud is to depend on the secret motives in his mind, which from their very nature it is impossible to know. Is it possible to conceive a rule of law more disastrously fraught with uncertainty of application, and more injurious to commercial security? But we hasten to add the masterly judgment of the Lord Chief Justice (who dissented from the court) to the opinions we have already recorded.

“I have bestowed some consideration on this subject, and am sorry to find myself obliged to differ from my brethren on a matter that appears to me, but for their opinion, too plain to admit of a doubt. In the first place, it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude. Every action for the breach of a promise, for deceit, for not

“ complying with a warranty, or for false representation, is
“ founded upon a legal fraud, which is charged as such in the
“ declaration, although there be *no moral guilt* in the defen-
“ dant. The warranty of a fact which does not exist, or the
“ representation of a material fact contrary to the truth, are
“ both said, in the language of the law, to be fraudulent,
“ although the party making them *suppose them to be correct*.
“ This point, if it could be doubted, is fully established by
“ the case of *Williamson v. Allison* (2 East. 446). That
“ was a declaration in tort for breach of a warranty, that
“ twenty-four dozen bottles of claret were in a fit and pro-
“ per state to be exported to India, whereas they were at
“ the time, and the defendant well knew they were, in a
“ very unfit and improper state. At the trial no evidence
“ was given of defendant’s knowledge, and the verdict being
“ for the plaintiff, a motion was made afterwards for a new
“ trial, on the ground that the scienter having been alleged
“ ought to have been proved. But the court, after full
“ discussion, and a reference to cases cited in the argu-
“ ment were unanimously of opinion that the allegation of
“ the scienter was wholly unnecessary and immaterial, and
“ therefore need not be proved. Now, if the action had
“ been for a false representation, made by the seller, of a
“ material fact, by reason of which the plaintiff was induced
“ to buy, although the seller might have supposed the fact
“ to be true, the same reasoning or the same rule would
“ apply; the difference between a warranty and a representa-
“ tion is nothing more than this, that where there is a
“ written contract the warranty forms a part of the contract,
“ but the representation is collateral to the contract, and
“ may be made verbally, though the contract may be in
“ writing; but if it be of a fact, without which the other
“ party would not have entered into the contract at all, or
“ atleast on the same terms, it is equally effectual, if untrue,
“ to avoid the contract, or to give an action for damages
“ on the ground of fraud. This is often illustrated by
“ actions, which have been very common of late, by the
“ purchasers of public houses, who have been induced to buy
“ or to give a great price for the goodwill of the house by a
“ representation of the extent of its business, and if that
“ representation of the extent of its business turns out to be
“ false, even though the party making it supposed it to be
“ true, and whether that party were the principal or the agent,
“ it has never been doubted that the contract is void, and that
“ the buyer may recover back his money in an action for
“ money had and received to his use. In the case of *Hodson*
“ *v. Williamson* (1 Wm. Bl. 463), Mr. Justice Yates lays it
“ down as a general proposition, that the concealment of
“ material circumstances vitiates all contracts, upon the prin-

“ciples of natural law. If this be true, can it be doubted
 “that the false representation of a material circumstance
 “also vitiates a contract? These principles are familiar to
 “every person conversant with the law of insurance. But
 “a policy of insurance is a contract, and is to be governed
 “by the same principles as govern other contracts. When
 “it is said to be a contract *aberrimæ fidei*, this only means
 “that the good faith which is the basis of all contracts is
 “more especially required in that species of contract in
 “which one of the parties is necessarily less acquainted
 “with the details of the subject of the contract than the
 “other. Now nothing is more certain than that the con-
 “cealment or misrepresentation, whether by principal or
 “agent, by design or by mistake, of a material fact, how-
 “ever innocently made, avoids the contract on the ground
 “of a legal fraud. But though I consider this case as
 “coming fully within the meaning of a legal fraud, even
 “if the agent is presumed to be ignorant of the falsehood
 “of his misrepresentation, I am very far from conceding
 “that it is a case void of all moral turpitude.”

Of this just judgment we should weaken the force by any comment of our own. The Court of Exchequer upheld the views of Mr. Baron Parke, and there was judgment for the plaintiff. It now becomes our duty to cite the next authority in favour of the view taken by Lord Abinger; it is *mirabile dictu*, from the same court, composed of the same judges who overruled him, and who took the opposite opinion in the case we have just cited. They have also since resumed their former opinion, and have in fact overruled themselves twice over in two considered judgments, laying down this same point in the 10th and 11th volumes of Meeson and Welsby with equal positiveness both ways, and overruling themselves moreover in the latter case without the slightest allusion to their former judgment! We have a high respect for the learned Barons of the Court of Exchequer, nor can more lucid or profounder judgments be cited than those which enrich the reports of their court; but we confess our entire inability to reconcile that astute precision and zealous activity of accumen, at all times so keenly awake to the smallest flaws in arguments by counsel, with the conflict of the following judgments, which we extract from the authorized reports. We have only to premise, that the case of *Smou v. Ilbery* (10 M. & W. 1), though it was decided

upon the point that a party could not be held liable for a representation believed to be true, and which he *had not the means* of knowing to be false (see p. 11), it clearly decides that the liability exists where the truth might have been ascertained, though the statement were *believed to be true*. In that case a widow had ordered goods on the assumption that her husband, who had sailed for China was alive, at a time when she could not have heard of his death. The question arose whether, by the order she gave for meat in her husband's name, she did not impliedly undertake that he was alive. We repeat, that had it been possible for her to have known that he was alive, she would, according to the judgment, have been held liable for the misrepresentation. In the case of *Taylor v. Ashton* (11 M. & W. 401), the misrepresentation was direct and express: it consisted in the report of a Joint Stock Banking Company, which represented itself in a prosperous condition, whereas it was not, and an action upon the case was brought, charging fraudulent misrepresentation and statements known by them to be untrue, against the defendants, by the plaintiff, who had been induced to take shares on the faith of the report. The jury found the defendants not guilty of the charge laid in the declaration, but guilty of gross negligence. Upon this the exact question arose which forms the subject of this article, and also of the judgment in *Smout v. Ilbery*, and which may be briefly put thus,—whether a falsehood in a statement, without fraud, is actionable? Here are the judgments, which we print side by side for facility of contrast:

SMOUT V. ILBERY.

"We took time to consider this question, and to examine the authorities on this subject, which is one of some difficulty. The point, how far an agent is personally liable, who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority with an intention to deceive, the agent would be personally responsible. But indepen-

TAYLOR V. ASHTON.

"It was contended by Mr. Knowles that it was not necessary moral fraud should be committed, in order to render those persons liable; for that if they made statements for their own benefit, which were calculated to induce another to take a particular step, and if he did take that step to his prejudice in consequence of such statements, and if such statements were false, the defendants were responsible, *though they had not been guilty of any moral*

dently of this, which is perfectly free from doubt, there seem to be still two other classes of cases in which an agent who, without actual authority, makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable; for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge, and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, *in which the courts have held that where a party making the contract as agent bona fide believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertions, it is equally just that he who makes*

fraud. Indeed, he said the finding of the jury on this issue would warrant the position he took, because the jury found the defendants not guilty, but at the same time said they begged to express their opinion that the defendants had been guilty of *gross negligence*; and it is insisted that even that, accompanied with a damage to the plaintiff, in consequence of that gross negligence, would be sufficient to give him a right of action. FROM THIS PROPOSITION WE ENTIRELY DISSENT, *because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made.* That is the doctrine laid down in *Pasley v. Freeman*, where, for the first time, the cases on this subject were considered. In that case Mr. Justice Grose differed from the rest of the court, and thought the law gave no remedy for fraud, unless there was a contract between the parties. The court, however, held that if a person told that which was untrue, and told it for a fraudulent purpose, and with the intention to induce another to do an act, and that act was done to the prejudice of the plaintiff, then an action for fraud would lie. That case was followed by *Haycraft v. Creasy*, and a great variety of other cases, and it must now be considered as *established law*. But then it was said, that in order to constitute that fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue; that it was enough that the fact *was* untrue, if they communicated that fact for a *deceitful purpose*; and to that proposition the court is prepared to assent. It is not necessary to shew that the defendants knew the fact to be untrue; if they stated a fact which was true for a

such assertion should be personally fraudulent purpose, they at the same time not believing that fact to be true, liable for its consequences." in that case it would be both a legal and moral fraud."

Parke, B., in the course of the argument—"I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud."

In *Smout v. Ilbery* the court thinks that the liability exists where there is no moral fraud at all. In *Taylor v. Ashton* they think that moral fraud is the *sine qua non* of liability. In the one case negligence alone in making statements is actionable, even where impliedly made; in the other, negligence alone in making statements is not actionable, though directly made! Where the subject-matter of the misrepresentation is that of an agent undertaking for his principal without authority, as in *Smout v. Ilbery* and other cases, which we have cited, it is clear that the misrepresentation is less direct, more likely to be unintentional, and less liable to the suspicion of moral fraud than where, as in *Taylor v. Ashton*, the misrepresentation was express, and not implied, and was moreover made by parties directly interested in its subject-matter (the value of commodity for sale, *ex gr.*), and where ignorance of the falsehood of the statement would be less probable, and fraud more likely to lurk. We name this to show that no sort of distinction, explanatory of the discrepancy of judgment on this point, can be based on the difference between representations by agents and by principals; for as far as such distinction goes, the Court of Exchequer upholds liability where the representation is least likely to be fraudulent, and denies it where it is most probable; but in point of fact there is no real distinction. The representation that a person is vested with an authority, which he has not got, is merely a misrepresentation on a party with any other mis-statement; and the principle of the law of fraud applies indifferently to either. (a)

(a) In *Polhill v. Walter*, 3 B. & Ad. 114 (1832), where the defendant had accepted a bill *per proc.* knowing that he had no authority to do so, but believing that the acceptance would be ratified, the court held that *corrupt motive* was not essential to an action for the fraud; but that the defendant

Lord Denman and the judges of the Court of Queen's Bench are now distinctly of opinion that fraudulent intent is *not* essential to the right of action, and have so ruled it in the recent case of *Collins v. Evans*, cited in a note to *Wilson v. Fuller* (3 Q. B. 78), although that decision was overruled in the Exchequer Chamber on writ of error (13 Law J. Q. B. 180).

In *Evans v. Collins* (decided in Q. B. Trin. Vic. June 24, 1843), Lord Denman, C. J., said, in delivering judgment, "One of two persons has suffered by the conduct of another. The sufferer is wholly free from blame; but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party whom he misled, should abide the consequence of his misconduct. The allegation that the defendant knew his representation to be false is therefore immaterial; without it, the declaration discloses enough to maintain the action and nothing that goes beyond that necessity need be proved."

True it is that this decision has been overruled by the Exchequer Chamber; but if we err not, the principle of the judgment has been subsequently re-established by a still higher jurisdiction—the House of Lords.

Railton v. Matthews, 10 Cl. & Fin. 934, is a decision directly analogous, and based on the self-same principle with the doctrines we have just cited. It was an appeal to the House of Lords. The respondents had not communicated certain facts affecting an agent's credit to the plaintiff, who became his co-surety in a bond to the respondents, without any communication with them, and it proving that they the

representation being "untrue to his knowledge," he was liable; though if he "had had good reason to believe his representation to be true, he would have incurred no liability." This judgment establishes a sort of *tertium quid*, and exhibits the wavering course of the decisions on the subject. It is a refinement upon *Taylor v. Ashton*, and equally distinguishable from the bolder document of *Smout v. Ilbery*, affording no authority for either. It asserts that where there is no knowledge of the falsehood there is no liability; but it does not go the length of saying that there must be absolute moral fraud to constitute it, for in *Poolhill v. Walker* there was none.

respondents knew facts materially affecting the credit of the agent. The agent having proved a defaulter, an action was raised in Scotland against all the obligors in the bond, and the appellant, one of them, raised another action against the respondents for reduction of the bond, on the ground that it was obtained fraudulently by the respondents, by means of a fraudulent concealment of material circumstances, known to them, and deeply affecting the credit of the agent, which they suppressed and concealed, and thereby that the bond was obtained by fraud and deceit. The two issues were afterwards joined in these actions; the Lord Chief Justice Clerk held at the trial that the "concealment must be first of things known to the defenders, or which they had good ground to suspect; 2dly. That the concealment therefore, being undue, must be wilful and intentional, with a view to the advantage they were to receive." The jury found accordingly. There was a bill of exceptions to this ruling, argued before the lords of the second division, who by an interlocutor disallowed it, and refused a new trial. The appeal in the House of Lords was against this interlocutor, and the House of Lords reversed the interlocutor, and in the course of the judgment Lord Cottenham said, "In my opinion there may be a case of improper concealment, or non-communication of facts, which ought to be communicated, which would affect the situation of the parties, *even if it was not wilful and intentional, and with a view to the advantage the parties were to receive.*" Lord Campbell thus laid down the rule:

"What is the meaning of *undue concealment* on the part of the defenders? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge, which they were bound *in point of law* to divulge; and whether they concealed those facts from one motive or another. I apprehend, is *wholly immaterial*. It certainly is *wholly immaterial to the interest of the surety, because to say that his obligations shall depend on that which is passing in the mind of the party requiring the bond, appears to me preposterous; for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the motive in his mind, or whether he was aware that these facts ought to be disclosed.* The

“liability of a surety must depend on the situation in which he is placed, *or the knowledge communicated to him* of the facts of the case, and not upon what was passing in the mind of the other party, *or the motive of the other party.* *If the facts are such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial.*”

It may be objected to this case that the decision went on the rule that the concealment of facts from an obligor of a bond, such as affect the credit of a person for whom such obligor is bound, invalidates the bond. Equally does the existence of fraud invalidate a contract: in both cases the question is virtually the same. Is it essential that the concealment in the one, and the fraud in the other, should be wilfully and knowingly perpetrated? The decision is therefore in point.

The plain principle of the authorities we have now cited for the liability of persons who make representations whereby others are defrauded, though without guilty knowledge of the fraud or intention to deceive, is this,—that men are responsible for the probable results of their acts; and wherever a man, without sufficient knowledge, takes upon himself to make an assertion which proves to be false, and it results in fraud, he is by every principle of justice liable for the fraud he occasions, and the injury of which he is the immediate cause. If the absence of *malus animus* were a defence for such misconduct, it would *à fortiori* excuse acts of negligence, which are daily the subject of actions where no shadow of *malus animus* is imputed. On what conceivable principle are wrongdoers held liable in one case, and exempted from all liability in the other? To borrow the admirable language of the Court of Exchequer, when overruling itself in *Smout v. Ilbery*, if their liability depends on the same principles as where the falsehood is known, “if that wrong (in the case of the misrepresentation) produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, *it is equally just that he should be personally liable for its consequences* * * *he holds himself out*

“as guaranteeing the consequences of his act.” This is the true reason of the liability. The person who makes the assertion undertakes for its truth. Lord Abinger expressly puts this on a parity with a warranty in *Cornfoot v. Fowke*; and though this is expressly denied by Tindal, C. J., in *Budd v. Fairmanners* (8 Bing. 38), in principle there is really no other difference than that between an express and an implied promise. Morally there is no distinction; and Story, in his excellent *Commentaries on Agency*, p. 227, n. (to which the Court of Exchequer refers in its *Smout v. Ilbery* judgment), says, “The damage is the same to the party who confided in such representation, whether the party making it acted with a knowledge of its falsity or not. *In short, he undertakes for the truth of his representation.*” And in the second edition of his *Treatise on Equity Jurisprudence*, vol. i. p. 166, after considering the subject of misrepresentation generally, he observes: “Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party.”

Whilst the benefit of holding men responsible for mis-statements, whereby others are defrauded, is thus palpable, where is the hardship to the persons thus rendered liable? In the first place their liability according to all the cases arises only where their mis-statement was the cause of injury to the sufferer. There are two classes of cases where persons ought to be held liable for these mis-statements, whether they knew them to be false or not. First, where the party making them is interested in the fraud; and, secondly, where he is not. In the first case, can there be a doubt that, according to morality and justice, he ought to be responsible, unless indeed the doctrine of *caveat emptor* is to be carried (as it was in a judgment we shall presently cite) to the length of making the ven-

dor profit by his own wrong, and rendered that very negligence which, in other cases would be itself actionable, in this a defence to an action? Where, however, in the other case, the person making the mis-statement had no interest in it there, unless the fact be affirmed were peculiarly within his knowledge, and not merely a naked assertion, he would not be liable; but where he knows that the other party will be guided by the statement, and he chooses to make it, not as a mere matter of opinion or belief, but as a fact within his actual knowledge, we ask, on what principle of justice, by what analogy of law, is he to be divested of legal liability for a voluntary statement of which he impliedly warrants the truth, and for which he is clearly morally responsible?

One very sound reason why the affirmant is held bound by the result of his statement is the impossibility of testing his motive. How can the real mind or the degree of belief be in all cases ascertained? If it cannot, motive is not a safe or a sound criterion of liability. On this ground in actions for libel, the law looks at the results and tendency of the act. *Chalmers v. Payne* (2 C. M. R. 156); *Fisher v. Clement* (10 B. & Cr. 472). In *Burrows v. Lock* (10 Vesey, 476), the Master of the Rolls said, "the plain-
"cannot dive into the secret recesses of the heart, so as to
"know whether the party did or did not *recollect* the fact,
"and it is no excuse to say he did not recollect it; at least
"it was *gross* negligence to *take upon him to aver distinctly*
"*and positively*, without giving himself the trouble to re-
"collect whether the fact was so or not." As Lord Campbell remarked, in *Matthews v. Railton*, the requirement that intent shall be proved is "preposterous;" it is worse than preposterous; it is a narrow and anti-social view of the requirements of justice in a great commercial country, where the mightiest enterprises and the largest interests are hourly staked on the integrity of individual credit. If men are to be held irresponsible for the results of false statements, whereby vast damages ensue, upon the plea of their own ignorance of the truth or falsehood of such statement, a blow is struck at good faith and the security of all commercial credit. We regard the last decision of the Exchequer Chamber in this light. We refer to the

case of *Ormerod v. Huth and others*, at the time we write reported only in the *Law Times* of June 28, 1845. It was an action on the case against the defendants, who were dealers in cotton, for fraud in representing certain samples of cotton as fair samples of 142 bales, which the plaintiff was thereby induced to buy at the price of 164*l.* 15*s.*, whereas they were not fair samples, but of a very inferior description. The judge who tried the cause at *nisi prius*, declared to the jury that *unless the jury could see grounds for inferring that the defendants or their brokers were acquainted with the fraud* that had been practised, or had acted against good faith or for some fraudulent purpose, the defendants were entitled to a verdict. The record then alleged that the jury gave a verdict for the defendants. The ground assigned for error thus stated the facts: "that when
 "a vendor, during the course of negotiating a sale, makes
 "a misrepresentation to the purchaser which is likely to
 "act as an inducement to the latter who subsequently completes the bargain, the vendor not having made any communication as to the extent or means of his knowledge
 "or ignorance, nor given any caution or explanation, and
 "the representation turns out to be false, and an action on
 "the case is brought upon it, the jury is not precluded
 "from finding in favour of the plaintiff by reason of knowledge of the falsehood, or of acting against good faith or with fraudulent intent, not being brought home to the defendant."

The court of error after a long argument, came to an immediate conclusion *without taking time to consider*, and confirmed the judgment of the court below; Tindal, C. J. is reputed to have said in giving judgment of the court of error:

"The rule which is to be derived from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, which is a matter for his own consideration, he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made and believed at the time to be true by the party making it,

“although not true in point of fact, we think this does not amount to fraud in law; but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action: and although the cases may in appearance raise some difficulty as to the effect of a false assertion or representation of title in the seller, yet it will be found on examination that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title, which was false, to the knowledge of the seller. The rule we have drawn from the cases appears to us to be supported so clearly by the early as well as the most recent decisions, that we think it unnecessary to bring them forward in recital, satisfying ourselves by saying that the exception must be disallowed, and the judgment of the Court of Exchequer affirmed.”

(Present Tindal, C. J., Williams, Coltman, Coleridge, Maule and Creswell, Js.)

This case affords matter of very grave consideration and no small apprehension on the part of mercantile men. If the law is to step in and extend its protection to those who knowingly or not are the instruments of frauds such as these, the security of commercial dealing is seriously shaken. We look upon this decision as a direct premium and inducement to the recklessness of the statements upon which a large proportion of the commercial transactions of this country are and must be necessarily based; it upholds an irresponsibility for falsehood which cannot but beget indifference to truth. If men are known to be irresponsible for the carelessness of their statements in matters vital to the interest of those they mislead, where is the security of the merchant and the tradesman in relying on those parol statements which form the basis of so vast a part of the dealings and business of life? No matter how basely defrauded—no matter how grievously injured,—unless the plaintiff can dive into the mind of a person who misled him, and exhibit his secret intent to a jury, the sufferer is remediless for the wrong done to him. That ignorance, which in no other action of a man's life is admissible as a plea for the most venial conduct, if illegal, is to be a lawful defence where the wrong done is a flagrant fraud, and its results a heavy and perhaps a ruinous injury, The doctrine

s monstrous in principle in its best aspect, but here, applied as it was the case where the statement was the basis of a contract, and the parties benefitted by the mis-statement were the parties who made it, we humbly submit it is irreconcilable with the very authorities on which it was alleged to be based. How is the doctrine of caveat emptor to apply? Are the purchasers of cotton henceforth to unpack every single bale and examine them seriatim? If so, there will be but little cotton bought and sold, we trow. *Dobell v. Stevens* (3 B. & Cr. 623) is a direct authority for holding a person liable for a mis-statement, though not laid as being known to be false in the declaration, and not embodied in a contract, but where like this it was the basis of it. Decisions there certainly are, and many of them, which uphold the general rule laid down in *Ormerod v. Huth*; but what are they? inane echos, and mere repetitions of the views of Grose, Lawrence and Leblanc, Js. in *Haycraft v. Creasy*, and like the judgment in *Ormerod v. Huth*, barren dicta divested of any attempt at a reason for their obvious divergence from the rules of responsibility in all other cases. The chief among them are *Budd v. Fairmaner* (8 Bing, 48); *Polhill v. Walter* (3 B. & Ad. 114); *Foster v. Charles* (7 Bing. 105); *Freeman v. Baker* (5 B. & Ad. 797); *Wilson v. Butler* (4 B. N. C. 748); *Ames v. Milward* (8 Taunt. 367); *Cornfoote v. Fowke* (6 M. & W. 358); *Fuller v. Wilson* (3 Q. B. 58 (a)); *Collins v. Evans* (13 Law Journ. Q. B. 180); *Pickering v. Dawson* (4 Taunt. 779), &c. &c.

Where is the principle by which these decisions uphold the non-liability of him who defrauds another by a mis-statement, simply because his intent to defraud is not shown? Where is the reasoning whereby they can withstand the phalanx of authority and the breadth and strength of principle by which we have shown that the contrary doctrine is fortified and vindicated? Mansfield—Kenyon—Best—Denham—Abinger—Sir James Mansfield—Cottenham—Campbell—Story—are these names and authorities against which the dicta of Mr. Justice Grose are to countervail? Are the great requirements

of commerce—the consistency of legal remedy—and above all, the imperishable interests of justice, to be sacrificed to a servile, mindless allegiance to precedents; regardless of those great principles and those high moral and social duties which the wisest and greatest of our judges have taught us to regard as the test and basis of law?

—*Law Magazine.*

S.

DIGEST OF PRINCIPAL MATTERS

CONTAINED IN VOL. I. QUEEN'S BENCH, OLD SERIES.

PAGE

ACCEPTANCE—See Bills and Notes.

ACCORD AND SATISFACTION.

To assumpsit for money due on account stated, the defendant pleaded that after the statement of the account, the plaintiff drew and defendant accepted a bill of exchange, and delivered the same to the plaintiff, who then accepted and received the same in discharge of the said sum, and endorsed the bill to a certain person unknown to the defendant, who is the holder thereof, and entitled to sue defendant on the same: Replication, that plaintiff did not accept and receive the bill in satisfaction and discharge of the said sum—Held on special demurrer, that the replication was bad, and the plea good.

Emblin v. Dartnell..... 222

ACTION—See Foreign Judgment Action on—See Money had and received.

AMENDMENT

Of Declaration—See Foreign Judgment, Action on.
Practice 1.

ANSWER—See Practice in Equity 3.

ARBITRATION AND AWARD.

Where a cause, and all matters in difference, are referred to an arbitrator, who is to make an award, the costs of witnesses, &c., attending before him are costs of the reference, and not costs of the cause.

Brown v. Nelson [Part II. 56]..... 408

ARBITRATOR

Finding of—See General Issue.

ATTACHMENT—See Witness.

ATTORNEY—See Money had and received.

ATTORNEY GENERAL—See Practice 3.

BILLS AND NOTES.

A bill was drawn by J. H. upon J. H. Across the bill was written "Accepted H. J. C." H. J. C. was sued as acceptor. Held that H. J. C. not being the person to whom the bill was addressed, could not be charged as acceptor.

Davis v. Clark..... 130

Giving time on—See Pleading 5.

—See Insolvency 1.

BOND—See Pleading 4.

CERTIFICATE OF DISCHARGE—See Insolvency 7.

COMMISSION IN BANKRUPTCY—See Insolvency 4, 5.

CONSIDERATION—See Mortgage 2.

CONTRACT.

Pleading, Variation of—See Evidence 2.

—See Landlord and Tenant 5.

COSTS—See Arbitration and Award.

—See Insolvency 6.

—See money had and received.

DAMAGES.

To an action of trespass for false imprisonment, the defendant pleaded, by way of justification, that the plaintiff had committed a felony. At the trial his counsel abandoned the plea, and exonerated the plaintiff from the charge:—Held that it was not a misdirection in the Judge to tell the Jury that the putting of such a plea on the record was a persisting in the charge contained in it and was to be taken into account by them in estimating the damages.

Warwick v. Foulkes 286

Measure of—See Insolvency 1.

—See General Issue.

ASSESSMENT OF.

Where the plaintiffs upon the trial of a cause had obtained a verdict upon some issues, and the defendants upon others, which went to the whole cause of action, and no damages were assessed, but the plaintiffs afterwards had judgment, non obstante verdicto, upon the pleas, on which the defendant had succeeded. Held that the plaintiffs were bound to take the risk of issuing a writ of inquiry to assess damages upon themselves, and the Court would not make absolute a rule, calling on the defendants to show cause why a writ of inquiry should not issue.

Pim v. Reid et al. 218

DECLARATION.

Service of—See Practice 5.

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DECREES.

Consolidation of—See Practice in Equity 2.

DEMURRER.

Setting down after time expires—See Practice in Equity 1.

See Accord and Satisfaction.

See Mortgage 2.

See Pleading in Equity.

See Pleading 1, 3, 5.

See Practice 2.

DISTRESS—See Landlord and Tenant 3.

DISTRIBUTIVE PLEAS—See Pleading 2.

EJECTMENT.

Where a defendant in ejectment was described in the consent rule as “landlord” but it appeared at the trial that he defended as owner of the premises: Held, that he was not precluded from showing that a third party was tenant to the lesser of the plaintiff.

Doe dem. Fellows et. al. v. Alford. 217

ESTATE—See Surrender by operation of law.

EVIDENCE 1.

In an action against the sheriff for seizing goods in execution, brought by a person who claims under the execution debtor, the warrant reciting a writ at suit of the execution creditor is *prima facie* evidence of the seizure having been made by his authority—An incorrect direction to the jury upon a point which was collateral to, and independent of, that upon which their verdict proceeded, is not a ground for a new trial.

Bessey v. Wyndham. 191

2.—Where the terms of a contract are varied by a contemporaneous memorandum, a defence arising therefrom may be given in evidence under the general issue, but if the memorandum was made after the original contract, such defence must be pleaded specially.

Heath v. Durant..... 220

3.—In detinue, the defendant cannot under the pleas of non-detinet and not possessed, shew that he had a common interest with the plaintiff in the property sought to be recovered e. g. that he was tenant in common; such defence ought to be specially pleaded. The assent of an executor to a bequest is not a matter of law, but a question of fact for the jury.

Mason v. Farnell..... 342

4.—Where a party filed a bill to set aside a deed on the ground of fraud. Held, that evidence of particular acts of fraud, although not charged in the bill, was admissible.

And where a part of the consideration for the deed sought to be set aside was a promise on the part of the grantee to make a lease for life of certain lands to the grantor, the bill prayed a specific performance thereof, and the defendant without making discovery of the circumstances pleaded to so much of the bill generally, that there was not any contract. Held that a plea in that form, intended as a plea of the statute of frauds, was insufficient.

Wright v. Henderson [Part II. 304]..... 656

See Ejectment.

See Master and Servant.

See Mortgage 3.

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EXECUTION.

Notice to Sheriff to levy. See Sheriff, Action against 2.

See Insolvency 3.

FALSE IMPRISONMENT—See Damages.

FALSE RETURN—See Sheriff, Action against.

FORECLOSURE.—See Mortgage 2.

FOREIGN JUDGMENT, ACTION ON.

An action is maintainable upon a decree of a Foreign Court of Equity in a suit which has terminated in ascertaining a clear balance, whereby one party is ordered to pay a sum certain to the other. Quære, whether an action is maintainable upon a similar decree of a Court of Equity in England. A judgment of a Colonial Court is not open to examination as to the merits of it, in an action brought upon it in the Courts of this country. Where, therefore, to a declaration on a decree of the equity side of the Supreme Court of Newfoundland, there was a plea that the decree was founded on a suit by the plaintiff in a representative right, in which she did not show a representative title, and also pleas of set-off. Held, that the subject matter of these pleas was pleadable in the Court of Newfoundland, and that they were no answer to the action.

As to an objection, that the declaration did not show the jurisdiction of the Court, leave was given to amend after argument.

Henderson v. Henderson..... 175

FRAUD—See Evidence 4.

See Sale of Land 2.

See Specific Performance.

FRAUDULENT PREFERENCE—See Insolvency 2.

FRIVOLOUS DEMURRER—See Practice 2.

GENERAL ISSUE.

To an action of debt on the common counts, the defendant pleaded, as to part. the general issue, and to the residue, payment after action brought, together with a set-off to the whole. The cause and all matters in difference having been referred to arbitration, the arbitrator awarded that a verdict be entered for the defendant on all the issues except the first, and on that issue for the plaintiff, without any damages; and that there were no other matters in difference :—Held, first that the plea of set-off, covering the whole cause of action, the finding the general issue without any damages was good; and secondly, that the finding a payment by the defendant, since action brought, of part of the sum claimed was not inconsistent with finding the set-off in his favor.

Warwick v. Cox..... 140

HUSBAND AND WIFE.

1.—Where an action is brought by a feme sole, who marries after the commencement of the suit, but before the trial, it is not necessary to sue out a scire facias, to make the husband a party to the suit.

Walker v Golling..... 31

INDIAN LAND, SALE OF--

See Sale of Land.

INFORMATION—See Practice 3.

INJUNCTION.

C. being seized in fee of certain lands on both sides of the river Humber, erected grist and saw mills on the east bank of the river, and on the west bank a woolen mill or factory, situate some distance farther down the stream, and having leased the latter, together with, &c., subsequently thereto leased the grist and saw mills to certain parties who have since assigned to the defendant. At the time the lease of the woolen mill was made, a dam had been erected across the river by C. about a quarter of a mile up the stream, for the purpose of carrying the waters thereof to the grist mill and saw mill, but which it was said, still permitted sufficient water to escape for driving the machinery of the woolen mill, and which had been built by C., for the purpose of consuming the waste water flowing from the said dam; after the defendant entered into possession of the grist and saw mills, he erected a new grist mill, and threw a new dam across the river, lower down the stream than the old one, and of more perfect construction; in consequence of which in the dry season, the bed of the river had become almost dry, and the plaintiff was unable to work his woolen mill, whereupon he filed a bill and obtained a special injunction restraining the defendant from making or continuing, &c., any dam, &c., whereby the natural flow of the river might be prevented, &c., so as to injure, &c.; the water power of the woolen mill, and at any time heretofore used, &c., and which the defendant moved upon affidavit to have dissolved. Held, that the Court would not dissolve the injunction, but retain the same until the hearing or a trial had been had at law.

Gamble v. Howland [Part II. I61]..... 513
See Sale of Goods 2.

INSOLVENCY.

1.—A party before his bankruptcy paid into the hands of a banking company the sum of £400, to be applied in discharge of three respective bills of exchange; but being indebted to the company to a larger amount, they, instead of performing their contract, put the money to his account. One of the bills was consequently dishonoured, and the other two remained in the hands of the holders until the bankruptcy. The assignees having declared

specially against the banking company held, that they were entitled to recover the full amount of the money paid into the hands of the defendants, as the true measure of damages was the amount which the bankrupt himself might have recovered if he had not become bankrupt, and not the ultimate loss to the bankrupt's estate according to the proofs upon it.

Hill v. Smith. 75

2.—In an action by the assignees of a bankrupt to recover the proceeds of an execution upon a warrant of attorney, alleged to have been given by way of fraudulent preference :—Held, that contemplation of approaching insolvency was sufficient to entitle the plaintiff to recover :—Held also, with reference to contemplation of bankruptcy, that in order to make a preference fraudulent and void, it was not necessary to show that the party contemplated any particular act of bankruptcy, or that he regarded bankruptcy as absolutely unavoidable.

Aldred v. Constable 92

3.—A Sheriff, who having seized goods under a Fieri Facias, sells them after notice to the execution creditor of an act of bankruptcy committed previous to the seizure, no fiat having been issued until after the sale, is not liable to be sued in trover. Even supposing the Sheriff a wrong doer in such a case, the execution creditor would not be liable in trover, though he took part of the proceeds of the sale out of court under a Judge's order. Semble, he would be liable in an action for money had and received. The defence, that the goods were seized under such circumstances, need not be specially pleaded.

Whitmore v. Green. 143

4.—Commission of bankruptcy superseded, on application to the Vice-Chancellor in the first instance and not by way of appeal.

In re Merritt et. al. 283

5.—K. having become a bankrupt, and passed the several examinations required by the statute 7 Vic., ch. 10, before E. C. Campbell, Esquire, Judge of the Niagara District Court, and obtained from the Commissioner his certificate, a petition was presented to the Vice-Chancellor by several of his creditors, praying a stay of the certificate, on grounds of fraud, &c.: Held, that the Commissioner of Bankruptcy is the only person who can exercise any discretion in granting or refusing the certificate to the bankrupt, under the provision of the Statute.

In re Kissock [Part II. 225]. 577

6.—Where a party, creditor of a trader, served the necessary notice of demand on the debtor, and obtained a summons of the Commissioner, calling upon the debtor to appear and either admit or deny, the claim of the creditor, according to the provisions of the Bankrupt Act of this Province, and, upon being served with such summons, the debtor appeared and asked for further time, which was granted; after which, and before the time allowed for the party again appearing, the creditor settled with the trader, taking certain securities for his debt; the costs of the proceedings the trader promised to pay, but afterwards refused; the creditor thereupon applied to the Commissioner under the 71st section of the Act, for an order upon the debtor to pay the costs, which the Commissioner refused; upon a petition filed by the creditor by way of appeal against the decision of the Commissioner, praying this Court to make an order for payment of such costs, the application was refused with costs.

In re Wallace [Part II. 233]. 585

7.—Where a trader had requested one of his creditors to sue out a commission of bankruptcy against such trader, and, upon the promise of being afterwards paid his debt in full, the creditor

sued out the commission, and the Judge below had refused to grant the bankrupt his certificate; upon a petition being presented to the Court of Review, on behalf of the bankrupt, against the order, refusing such certificate, the Court refused to interfere

In re Dettor [Part II. 278] 630*

JUDGMENT—Non obstante. See Damages, Assessment of.

JUSTICE OF THE PEACE.

Where a Justice has committed a prisoner upon an insufficient warrant, and has afterwards substituted a good warrant for it, this Court will not, on a return to a habeas corpus, look at the former warrant.

In re Richards et al. 151

LANDLORD AND TENANT.

It is an implied condition in the letting of a house that it shall be reasonably fit for habitation, if it be not (e. g., where it is greatly infested with bugs) the tenant may quit it without notice.

Smith v. Marrable 27

2.—The 3 and 4 Wm. IV., c. 27, s. 7, does not apply to cases where the tenancy at will had determined before the passing of the Act.

Doe dem Evans v. Page 84

3.—In replevin, the first cognizance as to part of the goods distrained stated that plaintiff held and enjoyed a certain marl and slack pit, as tenant thereof, at a rent of 8d. for each and every cubic yard of marl and slack dug and gotten by plaintiff from and out of the said pit, payable quarterly, &c. The second cognizance as to the residue of the goods stated that plaintiff held and enjoyed a certain brick mine as tenant thereof, at the rent of 1s. for every 1,000 bricks made and burnt by the plaintiff from the said mine, payable quarterly. Held, that the rent reserved was capable of being reduced to a certainty, and therefore a distress would lie.

Daniel v. Gracie 132

4.—Where the defendant was tenant from year to year of certain malting premises, which by reason of the default of the landlord in not repairing, according to his agreement so to do had become unfit for malting purposes:—Held, that that was no defence to an action for use and occupation for rent due subsequently to the premises becoming so unfit.

Surplice v. Farnsworth 185

5.—Where appellant had entered into a contract to demise certain premises for a term to the respondents, and previously to the commencement of the term to repair the old premises and build a new warehouse; and the respondents entered accordingly at the day agreed upon, but before the appellant had completed the building and repairs, and before the lease was executed, and a fire soon after destroyed the premises:—Held, that the respondents were not bound to execute a lease and rebuild the destroyed premises, the appellant not having completed his contract, and that till such completion the premises were at his risk.

Counter v. McPherson [Part II. 22] 374

LEASE—See Landlord and Tenant.

LEAVE AND LICENSE, PLEA OF—See Pleading 3.

MASTER AND SERVANT.

The presumption that a general hiring is a hiring for a year, is not an inflexible rule of law, but a question of fact to be determined by the Jury when considering the evidence in the cause; and, therefore, in the case of an action brought by the editor of a newly-established periodical, who had suddenly been dismissed from his situation, to recover a year's amount of salary, the Judge was held to have rightly left it to the Jury to say whether

the principle which was proved to be in force with respect to old-established periodicals, that an engagement as editor was always understood to be for a year, applied also where a new literary speculation had been entered upon,

Baxter v. Nurse..... 119

MEASURE OF DAMAGES.

See Damages—Sale of Goods 1.

MISDIRECTION.

See Evidence 1.

See Damages.

MONEY HAD AND RECEIVED.

A. mortgaged, with the usual proviso for repayment, and a covenant for re-conveyance at the costs and charges of the mortgagor, upon notice to repay the sum borrowed. The mortgagor's solicitor sent the solicitors for the mortgagee a draft re-conveyance, which was approved by them; but they refused to re-deliver up the title deeds unless the bill of costs was paid. One of the charges in the bill was in respect of the re-conveyance; the others arose exclusively from the relation of the mortgagee and the defendants as client and solicitor. On assumpsit by A. to recover back the money so paid:—Held, first, that the defendants were not entitled to withhold the deeds from the mortgagor. Secondly that mortgagor might maintain this action against the defendants for money extorted under distress of his goods, and paid by him under protest to the defendants for their own benefit.

Wakefield v. Newbon..... 136

See Insolvency 3.

MORTGAGE 1.

Motion to enlarge time for payment of mortgage money.

Ford v. Steeples..... 282

A. demurrer will not lie to a bill of foreclosure on the ground that the bill does not show that the plaintiff had actually paid a money consideration for the mortgage, or because it does not offer to do equity.

Kingsmill v. Gardner [Part II. 325]..... 677

3.—Where a party had given a mortgage to secure a debt for which he had made himself liable as surety, and had received from his principal a mortgage on his own estate for the same debt, &c., afterwards filed a bill to foreclose the latter and redeem the first mortgage, and the principal at the hearing objected to the bill on the ground that it was multifarious. Held, that the objection, if tenable, should have been taken by demurrer, and was too late at the hearing; and, quære if such objection would have been sustainable under the circumstances of the case.

Held also, that evidence taken by the plaintiff to contradict statements made in the answer was admissible, though not put in issue by the bill. Evidence not read in the cause cannot be made use of by the defendant to show that the suit is defective for want of parties; such defect must be apparent from the pleadings and evidence.

Schram v. Armstrong (Part II. 327)..... 679

NEW TRIAL—See Evidence 1.

NON DETINET, Evidence under Plea of—See Evidence 3.

NONSUIT.

To trespass against a land-tax commissioner for seizing the plaintiff's goods for a tax which had been redeemed (but without defendant's knowledge); he pleaded not guilty, by statute, and

delivered particulars stating that he intended to rely on the 38 Geo. III., c. 5, and 21 Jac. I., c. 12. At a trial the defendant claimed to be entitled to notice of action under the 5 and 6 Wm. IV., c. 20, s. 19, and the plaintiff being unable to prove the particulars was nonsuited; held, that the nonsuit was right.

Thomas v. Williams..... 223

NOT GUILTY—By Statute. See Nonsuit.

PARTIES—See Practice 7.

PAYMENT OUT OF COURT.

Application for payment of money out of Court, on plaintiff dismissing his bill. Motion, granted.

Clark v. Manners..... 278

PLEADING AT LAW.

1.—In assumpsit by the indorsee against the drawer of a bill of exchange, it is necessary to allege a promise to pay, and without such allegation, the count is bad on special demurrer.

Smith v. Cox..... 60

2.—When a defendant pleads the general issue, and several special pleas which are involved in the general issue, and the defendant succeeds on the general issue, but the special pleas are found for the plaintiff, the general issue is to be construed distributively for the purpose of taxation of costs; and the defendant is not allowed the costs on so much of the general issue as is involved in the special pleas found for the plaintiff, but such last mentioned costs are to be allowed to the plaintiff.

Nicholson and others v. Dyson..... 62

3.—Trespass for breaking and entering plaintiff's dwelling-house, and staying and continuing therein making a noise and disturbance for a long time, to wit, for four days then next following, and seizing his goods &c. Plea as to the breaking and entering the dwelling-house, and staying and continuing therein as in the declaration mentioned a justification by the leave and licence of the plaintiff, to take possession of certain goods. Replication, traversing the leave and license, and, new assignment, that the plaintiff issued his writ, &c., not only for the breaking and entering the dwelling-house and staying and continuing therein as in plea mentioned, but also for that the defendants, without the licence of the plaintiff, stayed and continued in the dwelling-house making such noise and disturbance, &c., for other and different purposes than those mentioned, and for a much longer time, to wit, three days longer than was necessary for taking possession of the goods. Held, that the replication and a new assignment were not bad for duplicity; time being, in the case of a continuing trespass, equally divisible for this purpose as space.

Loweth v. Smith..... 317

4.—To debt on bond, conditioned to pay money on demand, the defendant pleaded that no demand had been made before action. Replication, that there had been such a demand, concluding to the country:—Held, that the replication was good.

Thorne v. Jenkins..... 351

5.—A declaration stated that one I. was indebted to the plaintiff in £17 11s., and thereupon in consideration that the plaintiff would, for and on account of the said sum accept the joint and several promissory notes of I. and one E. for payment of £17 11s., six months after date, and would thereby give time to I. for payment of the said debt, the defendant promised to pay the sum of £17 11s., if the said promissory notes were not duly honored and paid. It then averred the acceptance of the note, and the non-payment of it when due, although the said I. and E. were afterwards re-

quested so to do; and notice of the premises to the defendant, and alleged for breach the non-payment of £17 11s., by the defendant. The plea traversed the request to I. and E.:—Held, on demurrer, that the plea was bad. The giving a bill, “for and on account,” of a debt is, *prima facie* an agreement to forbear enforcing payment of the debt, until the bill be due.

Walton v. Maskell [Part II. 57]..... 409
See Accord and Satisfaction.
See Practice 2.
See Sheriff.
See Trespass 1.

PLEADING IN EQUITY.

Demurrer the Bill set forth an indenture purporting to be a lease with a covenant for leave to lessee to become purchaser of the demised premises, upon certain stipulated terms, but alleged that before and at the time of the execution of the said indenture, it was expressed and understood by the parties thereto, that it should and that in fact it did, operate and take effect as an absolute conveyance and mortgage of the premises therein mentioned, and that the amount of rent reserved was determined by the interest of the purchase money £1,000 and that the rent was in fact paid as interest thereon, and the bill prayed (amongst other things) an account of what was due for principal and interest in respect of the purchase money, and a specific performance of the covenant for purchase; defendant demurred to the bill, and the demurrer was allowed.

Cullen v. Price et. al..... 302

PRACTICE.

1.—A Judge at nisi prius may, under the Stat. 3 and 4 Wm. IV. c. 42, s. 23, amend a declaration in ejectment by an alteration in the date of the demise, whether the day laid in the declaration is a wrong day or an impossible.

Doe dem Simpson v. Hall..... 24

2.—Where, in an action on a bill of exchange by the indorsee against the acceptor, the declaration alleged that “one J. Bankes” made his bill, &c., and the defendant demurred thereto, on the ground that the Christian name of Bankes ought to have been set out in full, or that it should have been alleged that he was designated by the initial letter only in the original instrument, the Court set aside the demurrer as frivolous.

Braithwaite v. Harrison..... 25

3.—A rule, on the part of the Attorney-General, to amend an information at the suit of the Crown, is absolute in the first instance.

Attorney-General v. Ray..... 59

4.—Practice as to service of a rule for leave to issue scire facias to revive an old judgment.

Macdonald v. Maclaren..... 60

5.—Service of a notice of declaration on one of two joint defendants, who are partners, at the partnership place of business, is not a sufficient service upon the other. Quare, whether the service would be sufficient, if it appeared that the subject matter of the declaration related to a partnership debt.

Moulston v. Wire and another..... 219

6.—The affidavit in support of a motion to set aside process, served in a wrong county, stated that the process had been served more than two hundred yards from the boundaries of the proper county. Held sufficient, without adding that there was no dispute as to boundaries.

Martin v. Granger [Part II. 52].....

- 7.—Where one of several defendants has become bankrupt, his assignees are necessary parties, and the Court will not proceed to make a decree in their absence.

Barnhart v. Patterson [Part II. 321]..... 673

PRACTICE IN EQUITY.

- 1.—The defendants having filed a demurrer to part of the bill, and the time for setting the same down for argument by the plaintiff having been allowed to expire, the defendant gave notice of motion for an order to declare the said demurrer allowed, and for the costs thereof. Held, that an order for that purpose is necessary, inasmuch as the Master could not tax the costs of the demurrer without an order declaring it allowed, but might be obtained on a side bar motion.

Winstanley v. King's College [Part II. 228]..... 580

- 2.—The Court cannot order the decrees of two original suits to be consolidated.

Brown v. Kingsmill [Part II. 229]..... 158

- 3.—Parties to the suit will not be allowed to bid at the auction, but will be permitted to have a reserve bidding.

Philips v. Conger [Part II. 231]..... 583

- 4.—An answer improperly filed, will be ordered to be taken off the files, upon motion of the plaintiff.

Connell v. Connell [Part II. 232]..... 584

See Specific Performance.

PRESUMPTION—See Master and Servant.

PROCESS, Setting Aside—See Practice 6.

PUBLIC OFFICER, Action Against—See Nonsuit.

SALE OF GOODS.

- 1.—In an action for goods sold, &c., the particulars of demand stated the action to be brought “to recover the sum of £37, the balance of an account of £108,” (giving no credit for any specific sums.) The defendant pleaded as to £5 parcel, &c., a set-off to that amount. Held, that it was a question for the Jury to say, whether the balance claimed meant a sum, after giving credit for the £5 set-off.

Townson v. Jackson [Part II. 53]..... 405

- 2.—This Court will not grant an injunction at a suit of a mortgagee of chattels, against a judgment creditor of the mortgagor, to prevent a sale of the chattels, the rule being of universal application that the Court will protect the specific possession of chattels only in case they are of peculiar value.

Geddes v. Morley et al. [Part II. 322]..... 675

SALE OF GOODS—See Sheriff 1.

—See Stoppage in Transitu.

SALE OF LAND.

- 1.—A bill being filed to recind a contract for the purchase of an Indian right to certain lands on the Grand River, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands: Held, that as the whole estate, both legal and equitable, was in the Crown, it was not a case in which the Court would interfere, even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to be dismissed with costs.

Bown v. West [Part II. 287]..... 639

SALE BY COURT—See Practice in Equity 3.

SCI. FA.—See Husband and Wife 1—Practice 4.

SET-OFF—See Sale of Goods 1.

SHERIFF.

To trespass for seizing the plaintiff's goods, the defendant pleaded that C. recovered a judgment against F., and sued out a fieri facias directed to the defendant as Sheriff, and commending him to levy on the goods of F., by virtue of which writ, the defendant seized and took the goods of F. in execution, quæ. sunt eadem. Held, bad. In trespass, de bonis asportatis, a plea denying that the goods are the plaintiff's puts in issue the property in, as well as the possession of, the goods.

Harrison v. Dixon..... 213

See Evidence 1.

See Insolvency 3.

SHERIFF, Action Against.

1.—If a father and son have the same name of baptism and surname, and a writ of fi. fa., issue against the son, without the addition of "the younger" prima facie, the father is intended. But this is only a prima facie intendment, and if the sheriff take the father's goods under the writ, and to an action of trespass by the father, plead that the fi. fa., was issued against him, the prima facie intendment may be rebutted, by proof that the writ issued against the son. Quaere, whether the sheriff could justify under any form of pleading? Semble, that the writ de indentitate nomine does not apply to a simple taking by a plaintiff of the wrong person or goods; and even if it did it would not take away the right to bring trespass also. A direction by the Attorney to the Sheriff to seize under a writ of execution, is an act done by an agent within the scope of his authority and binds the principal. The client therefore, is liable in trespass for the act of the Attorney, in directing the Sheriff to take the goods of the wrong party.

Jarman v. Hooper 246

2.—In an action against the Sheriff for not levying and for a false return of nulla bona, it appeared that a writ of fi. fa., was issued by the plaintiff against the goods of W., and was delivered to the Sheriff on the 7th of June, with a direction to issue the warrant immediately, and the seizure took place the day after. Previously (on the 1st of June) B. had delivered a writ of fi. fa., against W. to the Sheriff, with directions to execute it, at the same time suggesting that the the next morning would be the best time the purpose, but he did not order the Sheriff to restrain the execution until that time. Subsequently (W. having offered £50 to stay the execution.) B. verbally desired the Sheriff and on the 2nd of June gave him written notice, not to execute the writ until further orders. The £50 not being paid, B. requested the Sheriff to proceed, and the Bailiff accordingly entered, but found the plaintiff in possession. The Sheriff then sold the goods, paid the money to B. and returned nulla bona to the plaintiff's writ. The Jury found that B's. writ was in the first instance intended to be executed:—Held, that the notice by B. not to execute the writ until further orders was equivalent to a withdrawal of his writ, which could not be considered as in the hands of the Sheriff to be executed, within the meaning of 29 Car. 2, c. 3, s. 16, until the order to proceed; and therefore that the plaintiff was entitled to a verdict for the amount levied.

Hunt v. Hooper..... 309

SPECIFIC PERFORMANCE.

A suit having been brought for the specific performance of an agreement of compromise, and after amendment of the bill and a special injunction granted, on the merits confessed in answer

to the original bill, restraining proceedings at law, judgment was obtained in an action brought by the defendants for the recovery of the whole amount originally claimed, but which the plaintiff had always denied his liability to pay, a motion was made—amongst other things for the payment into Court of the amount of the judgment, or for security for the performance, by plaintiff, of the decree of the Court. Payment into Court refused, but security ordered to be given for the performance of the articles of compromise, in the event of the same being decreed.

Merritt v. Tobin [Part II. 257]..... 609

STOPPAGE IN TRANSITU.

Where goods were entered in the books of the West India Dock Company in the name of the original consignee as owner, such consignee having sold them to A., who had afterwards made a sub-sale to B., and had given to B. a delivery order for the goods upon the Company. Held, that the right of A. to stop the goods in transitu was not thereby defeated, such order being one upon which the Company, according to their invariable custom, had declined to act, and had refused to deliver the goods to B., without an order from the original consignee.

Lackington v. Atherton..... 87

SUBPENA, Disobedience to. See Witness.

SURRENDER BY OPERATION OF LAW.

In order to constitute the surrender of a particular estate by an act and operation of law, the owner of the particular estate must be a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid, if his particular estate had continued to exist. In all such cases the law attaches to the act done the legal consequences of a surrender, independently of any intention in the parties to surrender the particular estate, or even in spite of an express intention to keep it un-surrendered; but

The mere consent of the owner of a particular estate to an act done by the reversioner is insufficient, at least in case of such things as pass by deed.

Quære, whether not also in matter which lie in livery, contrary to the doctrine laid down in *Thomas v. Cook* (2 Stark 408, 2 B. & A. 119), *Stone v. Whiting* (2 Stark 235), *Walker v. Richardson* (2 M. & W. 882), &c.?

The acts in pais, which operate by way of estoppel, anciently were, and in contemplation of law have always continued to be, acts of notoriety, less formal and solemn than the execution of a deed, but the concurrence of the parties to which there could from that notoriety be no difficulty in ascertaining.

The principle regulating the presuming documents in support of beneficial enjoyment is that where there has been a long enjoyment of any right which could have had no lawful origin except by deed, there, in favor of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption.

Lyon v. Reed..... 161

TENANCY AT WILL—See Landlord and Tenant 2.

TENANT.

TRESPASS.

Trespass for breaking and entering a close of plaintiff, and digging up and removing clay, sand, &c. Plea, that the defendant was the occupier of a certain tenement and premises, to wit a brick-kiln, and that he, as such occupier, and all the occupiers for the time being of the said tenement, for the full period of thirty

years, had had and enjoyed, as of right and without interruption, a right to dig, take, and carry away from the place in question as much of the clay of the said close as was at any time required by him of them for the purpose of making bricks at his said kiln in every year, and at all times of the year. Replication taking issue thereon :—Held, after verdict for defendant, that this plea was bad, as setting up an indefinite claim to take clay from out of the close of the plaintiff. Evidence of the exercise of the right in question whenever the party had occasion to do so, without showing that it took place at all times of the year, is sufficient to support this plea.

Clayton v. Corby..... 78

TRESPASS.—See Sheriff 1.

USE AND OCCUPATION.—See Landlord and Tenant 4.

WARRANT.—See Justice of the Peace.

WATERS AND WATERCOURSES.—See Injunction.

WITNESS.

- 1.—Though a witness may not have been called in Court on his subpœna, yet, if it clearly appear from the affidavits in support of the application for an attachment against him that he did not attend the trial, the Court will make the rule for the attachment absolute. 2.—A witness being served with a subpœna, did not object to the amount of the conduct money, but offered to bear his own expenses. Not having attended the trial, a rule nisi for an attachment against him having been granted :—Held, that as he made no objection to the amount of the conduct money when the subpœna was served on him, it was not competent to him to avail himself of the insufficiency of the amount tendered as an answer to a rule nisi for an attachment. 3.—A master maltster, resident at a distance from his malt-house, placed his servant in charge of malt in process of manufacture, strictly enjoining him not to leave it at any time whatever. The servant having been subpœnaed as a witness.—Held, that the injunctions of the master afforded no sufficient excuse for disobeying the subpœna, although it was served upon him so short a time before the trial as to preclude the possibility of his communicating with his master.

Gough v. Miller..... 155

WITNESS FEES.—See Arbitration and Award.



